

Before the
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In the matter of:

The Digital Performance
Right in Sound Recordings || Docket No.
and Ephemeral Recordings || 2005-1 CRB DTRA
(Webcasting Rate
Adjustment Proceeding)

Volume 12

Room LM-414
Library of Congress
First and Independence Ave., S.E.
Washington, D.C. 20540

Thursday,
May 18, 2006

The above-entitled matter came on for
hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

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1 P-R-O-C-E-E-D-I-N-G-S

2 9:38 a.m.

3 CHIEF JUDGE SLEDGE: On the
4 record. All right. As we return to Dr.
5 Brynjolfsson's testimony, we have pending a
6 motion to strike significant parts of his
7 testimony and I'm not sure if the memory is
8 accurate or just something expected but the
9 Court was expecting written arguments on this
10 motion by the various sides and we've gotten
11 none. So we will start considering this
12 motion directly and I encourage all the
13 parties, if you wish, to file written
14 arguments within a week and we'll start
15 addressing that motion soon.

16 MR. STEINTHAL: Your Honor, we're
17 basically almost there. We're doing our cite
18 checking and we'll file something early next
19 week.

20 CHIEF JUDGE SLEDGE: We didn't
21 make that up.

22 MR. STEINTHAL: No.

1 CHIEF JUDGE SLEDGE: I couldn't
2 find it in my notes and I just frankly
3 couldn't be sure that the parties had
4 indicated a desire to file written arguments
5 even I believe that to be the case.

6 MR. PERRELLI: Your Honor, Tom
7 Perrelli for Sound Exchange filling in for
8 Paul Smith today. Counsel had indicated that
9 they were intending to file written motion and
10 our intent was to respond to that once we
11 received it. Does that comport with the
12 Court?

13 CHIEF JUDGE SLEDGE: We have
14 before us a motion. We're ready to proceed on
15 a motion we already have and we'll be informed
16 by any written arguments that you might.

17 MR. STEINTHAL: And, Your Honor,
18 my understanding, if it's in the transcript,
19 it would be that Mr. Smith or Mr. Handzo
20 volunteered that they would like to put some
21 written authorities in in opposition to the
22 motion. We indicated we would very much like

1 to put in authorities as well. So I don't
2 think this is the framework of a motion to be
3 made with the response and then a reply. I
4 think what Your Honor --

5 CHIEF JUDGE SLEDGE: It might be
6 pending.

7 MR. STEINTHAL: Yes. So we will
8 submit our authorities in support of it early
9 next week.

10 CHIEF JUDGE SLEDGE: Thank you.

11 MR. PERRELLI: We will do the
12 same.

13 MR. STEINTHAL: And on another
14 housekeeping issue, we do have our opposition
15 motion, opposition to the motion, on the SDARS
16 agreement which is due today that we will be
17 filing later and we'll try to get you a
18 courtesy copy this afternoon in the courtroom.

19 CHIEF JUDGE SLEDGE: That's really
20 not necessary.

21 MR. STEINTHAL: Okay.

22 CHIEF JUDGE SLEDGE: That's

1 something that we'll not address any faster
2 than what we'll receive your filed copy.

3 (Pause.)

4 CHIEF JUDGE SLEDGE: All right.
5 Mr. Joseph, my notes indicate you were still
6 examining when we completed the testimony on
7 that Wednesday.

8 MR. JOSEPH: I was, Your Honor.

9 CHIEF JUDGE SLEDGE: Are you ready
10 to resume?

11 MR. JOSEPH: Yes I am, Your Honor.

12 CHIEF JUDGE SLEDGE: Thank you.

13 MR. JOSEPH: Thank you.

14 WHEREUPON,

15 ERIK BRYNJOLFSSON
16 was recalled for examination by Counsel having
17 been previously duly sworn, reassumed the
18 witness stand, was reexamined and testified as
19 follows:

20 CROSS EXAMINATION (CONT'D)

21 BY MR. JOSEPH:

22 Q Good morning, Dr. Brynjolfsson,

1 welcome back.

2 A Good morning.

3 Q Since you were here last, have you
4 discussed your testimony with anyone?

5 A No, I have not.

6 Q Let me ask you to turn to page 12
7 of your report. You probably have your report
8 in one of the binders there, your original
9 testimony.

10 A Yes.

11 Q And just refer to the spot toward
12 the bottom where you put in a block quote from
13 *Radio and Internet News* about industry experts
14 in support of your proposition that there is
15 some evidence in the marketplace as to
16 revenues that a webcaster needs in order to
17 become profitable.

18 A Yes.

19 Q And you see that block quote
20 there.

21 A Yes I do.

22 Q Now I would like to ask you to

1 refer back to that article which was Services
2 Exhibit 28. I'm assuming -- You may actually
3 have it there.

4 A I'll look.

5 Q I'm not sure whether -- For
6 convenience, I have a photocopy of it, but
7 it's probably not as good as the exhibit as it
8 was passed out.

9 A It looks like I have it.

10 Q And the paragraph you quote is on
11 the second page of the Newsletter, correct,
12 "Industry experts have agreed"?

13 A Yes, I see it.

14 Q Okay. I ask you to take a look at
15 the beginning of the very next paragraph after
16 the language you quote. In fact, it's the
17 very next material. RAIN there says, "But for
18 most..." By the way, this was September 7,
19 2005. Right? This article?

20 A Yes.

21 Q Shortly before you submitted your
22 written direct testimony.

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1 A Yes.

2 Q You see the beginning of the next
3 paragraph. "But for most webcasters,
4 advertising is not yet covering these costs."

5 A Yes.

6 Q Did you quote -- Well, let me just
7 ask it this way. You didn't quote that piece
8 of the article that immediately followed the
9 paragraph you quoted anywhere in your
10 testimony, did you?

11 A No, I did not.

12 Q You spoke about stream ripping
13 during --

14 A Are we done with this?

15 Q We're done with that. You spoke
16 about stream ripping during your testimony.
17 When you prepared your testimony, you didn't
18 or prior to preparing your testimony, you
19 didn't examine the extent to which stream
20 ripping actually occurs with radio simulcast,
21 did you?

22 A When you say "the extent"?

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1 Q The extent to which it actually
2 occurs with radio simulcast.

3 A Well, not in any great detail, but
4 what I did was I ascertained its feasibility
5 and I verified that personally and I
6 ascertained that the stream ripper ripping
7 sites, there were multiple such sites on the,
8 available on the internet and apparently
9 people who visit sites like iTunes also visit
10 these stream ripping sites frequently.

11 Q My question was with respect to
12 radio simulcast, simulcast of radio broadcast
13 transmissions. You didn't separately assess
14 ripping with respect to radio broadcast
15 transmissions, did you?

16 A Well, I inferred from that fact
17 that they advertised as being used for
18 ripping. You mean radio specifically versus -
19 -

20 Q Radio broadcast, over-the-air
21 radio.

22 A As it refers to --

1 Q Simulcast of over-the-air radio
2 broadcast stations. Yes sir.

3 A I didn't give much thought to
4 separately assessing versus other kinds of
5 webcasting. Is that the essence of your
6 question?

7 Q That's the essence of my question.

8 A Okay. Right.

9 Q And in fact, you didn't separately
10 assess that, did you?

11 A No. No.

12 Q Now let me ask you to turn to page
13 nine of your written statement and you have --
14 Let me just see if I can find exactly where it
15 is. The right top of the page. "If the
16 compulsory license rate is too high..." I'm
17 sorry. That's not it. You say that "If the
18 interests of the..." Let me just find this
19 precisely. You say "If the rates, the
20 statutory license rates, were too high the
21 record companies could and would offer a
22 royalty rate lower than the statutory rate."

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1 Correct? And that's in that first paragraph
2 just before the -- It's in the third sentence
3 of that first paragraph. Right/

4 A Yes.

5 Q Okay. And you were talking about
6 the statutory licence fee there. Correct?

7 A Well, yes.

8 Q Okay. Now were you aware when you
9 made that statement that the major record
10 companies meet regularly to plan a collective
11 strategy for pricing the licenses to
12 webcasters under the statutory license?

13 A No.

14 Q In your testimony when you were
15 here last week, you spoke of the concept of
16 rent dissipation and rents. What do you mean
17 by "rents" when you speak of rent dissipation?
18 As an economist, what does the term mean?

19 A Well, if -- You can think of it as
20 by analogy just to rents on physical property.
21 If you own something that is valuable, then
22 you can earn revenues on that.

1 Q Isn't it commonly in economics
2 meant to mean prices that a producer is able
3 to charge above cost?

4 A Yeah, you could take it that way.

5 Q Now let me ask you to turn to page
6 15 of your written direct testimony where you
7 state that "In the last several years,
8 bandwidth costs have fallen by 20 to 40
9 percent per year due to technology
10 improvements and intense competition." Do you
11 see that right at the start of the bandwidth
12 costs statement?

13 A Yes.

14 Q Would you also agree that part of
15 the drop in bandwidth prices you discuss has
16 resulted from the overbuilding of bandwidth
17 during the internet bubble and the drop in
18 demand that resulted after the bursting of the
19 internet bubble?

20 A I think that may have been a
21 factor. Yes.

22 Q Now last week when you were

1 discussing the possibility that listening to
2 streaming substitutes for record sales, I
3 believe you identified articles by Blackburn,
4 one article by Blackburn and one article by
5 Liebowitz.

6 A Yes.

7 Q Did you not? As evidence that
8 internet music may hurt record sales.
9 Correct?

10 A Yes.

11 Q As I recall, you describe the
12 Blackburn article as very careful in detailed
13 analysis. Correct?

14 A Yes, I think so.

15 Q Is it fair to say you considered
16 it a good paper?

17 A Yes, I did.

18 Q And for that reason, you cited it.

19 A Yes.

20 Q Is it fair to say you considered
21 the Liebowitz paper to be a good paper?

22 A Yes.

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1 Q Now isn't it a fact that both of
2 those papers actually discussed file sharing?

3 A That was the focus of each of
4 those papers.

5 Q And file sharing is the
6 downloading of specific recording for
7 permanent ownership, is it not?

8 A Yes.

9 Q Now remember actually during your
10 direct testimony, I think you were careful to
11 correct yourself when discussing Blackburn's
12 paper. You had started to say downloading but
13 quickly changed it to internet music, didn't
14 you?

15 A I don't recall.

16 Q You don't recall that. Well,
17 would you agree that the articles actually say
18 nothing about streaming?

19 A They're not -- They don't
20 explicitly discuss streaming to my
21 recollection. I don't recall.

22 Q They don't discuss streaming at

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1 all, do they?

2 A Not to my recollection.

3 MR. JOSEPH: Well, why don't we
4 just give you an opportunity to confirm that.
5 First, let me give you the Blackburn article.
6 I'll hand it first. Actually, we might as
7 well hand them both out. It will be quicker
8 and easier. I should have actually handed
9 them both out together. Documents marked
10 Services Exhibits 100 and 101, 100 being the
11 Blackburn article and 101 being the Liebowitz
12 article.

13 (Whereupon, the above-
14 referred to documents
15 were marked as Service
16 Exhibits Nos. 100 and
17 101 for identification.)

18 BY MR. JOSEPH:

19 Q Now, Dr. Brynjolfsson, take your
20 time. Take a look at the Blackburn and
21 Liebowitz articles and let me just ask you
22 whether there is anything in either of these

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1 articles that discussed streaming. Dr.
2 Brynjolfsson, I think you've now had about
3 seven or eight minutes perhaps to look at the
4 articles. Do you see any references to
5 streaming?

6 A No, I don't.

7 Q Would you agree that file sharing
8 and streaming are different activities?

9 A They are different but related.

10 Q Would you agree that you can't
11 draw conclusions about the substitutional
12 impact of streaming from articles about files
13 sharing?

14 A No.

15 Q Well, let me ask you to turn to
16 pages 222 and 223 of your deposition when I
17 asked you similar questions, in fact, the same
18 questions back in your deposition. Do you
19 have your deposition?

20 A Let me look. I don't seem to.

21 MR. JOSEPH: Okay. I'll see what
22 we can do. I guess we need to mark this as SX

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1 102 or Services 102, not SX.

2 (Whereupon, the above-
3 referred to document was
4 marked as Services
5 Exhibit No. 102 for
6 identification.)

7 MR. JOSEPH: Here's an excerpt I
8 think everybody has been provided previously
9 with the full one.

10 THE WITNESS: Thanks.

11 BY MR. JOSEPH:

12 Q I actually ask you to look at the
13 bottom of page 222 which is the third page of
14 the exhibit. You would agree, would you not,
15 and I asked you the question, "You would
16 agree, would you not, that file sharing and
17 streaming are likely to -- are different?"
18 You said, "They have some similarities and
19 they have some differences but they are not
20 identical."

21 A Sir, which page is this on?

22 Q Two twenty-two.

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1 A Okay. Oh yeah. I have it.

2 Q Right at the bottom.

3 A Yep.

4 Q And then we carry over to 223. I
5 ask, "Which means they're different?" You
6 say, "Which means you can make some inferences
7 from one or the other but that they are not --
8 That they are different, yes." And then I
9 asked you, "What inferences can you make about
10 streaming under the statutory license from
11 information about file sharing?" and your
12 response was "I don't think you can make
13 strong inferences and I don't in my report.
14 So I would be hesitant to come to any
15 specific conclusions." Do you remember that
16 exchange?

17 A Yes.

18 Q I'm going to ask you to turn to
19 page five of the Blackburn article which was
20 Services Exhibit 100. Do you see right under
21 the heading "2. The Recorded Music Industry."

22 A Hm-hm (yes.)

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1 Q Dr. Blackburn says that "The
2 recorded music industry is extremely
3 concentrated both horizontally and
4 vertically."

5 A Yes.

6 Q Do you have any reason to doubt
7 Dr. Blackburn's view of the recording industry
8 when he wrote his article?

9 A I wouldn't use the same words. I
10 wouldn't say extremely concentrated.

11 Q Dr. Blackburn believed they were
12 extremely concentrated. Correct?

13 A Yeah, technically he wasn't a
14 doctor when he wrote that, but yeah.

15 Q He used this to become one.
16 Correct?

17 A Yes, he did.

18 Q And he succeeded in becoming one?

19 A Yes, he did.

20 Q May I ask you to turn to page two
21 of the article?

22 A Sure.

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1 Q Right at the bottom, talking about
2 the games. I think he's referring to the
3 games and CD sales or growth in the music
4 industry, the recording industry quickly
5 disappeared and industry sources were quick to
6 attribute this decline to the rapidly
7 increasing popularity of Napster. Do you see
8 that?

9 A Yes.

10 Q Do you have any reason to doubt
11 the accuracy of his description of the reasons
12 given by the recording industry for the
13 decline in sales at that time?

14 A No, I think that was given as one
15 of the reasons that people were speculating
16 about it.

17 Q Let me ask you to turn to page two
18 of the Liebowitz article.

19 A Ah-ha (yes).

20 Q Actually, yes, page two of the
21 Liebowitz article and the bottom of the last
22 full paragraph on the page, the industry

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1 referring to the recording industry, see where
2 he says rather, "The industry," referring to
3 the recording industry, "has blamed this
4 decline," once again the swoon in sales that's
5 referenced in the prior sentence, "to the
6 rapid growth of file sharing and in an attempt
7 to stem this growth in peer-to-peer usage has
8 sued thousands of individuals heavily engaging
9 in file sharing." So you have any reason to
10 doubt the accuracy of Dr. Liebowitz's
11 statement about what the recording industry
12 was blaming for the drop in sales as of the
13 time this article was written which was March
14 2005?

15 A No.

16 Q Now let me ask you to turn to page
17 36 of the Liebowitz article that you just had
18 in your hand. Let me ask you to take a look
19 at the very final paragraph of the paper where
20 Dr. Liebowitz says "In closing, I can only
21 repeat what is generally understood but all
22 too frequently ignored which is that before

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1 drawing inferences from data whether file
2 sharing or any other economic activity, we
3 need to carefully examine the data that we are
4 provided. Economists are often merely
5 consumers of data, but particularly in markets
6 that are new or where data vendors have not
7 yet created and demonstrated the value of
8 their methodologies, we need to heed the
9 caveat emptor warning before we accept the
10 numbers that we are all too eager to put to
11 use." Do you agree with Dr. Liebowitz's
12 description of the use of data?

13 A Yes, I do.

14 MR. JOSEPH: Okay. I have no
15 further questions, Your Honor.

16 CHIEF JUDGE SLEDGE: Ms. Brown, do
17 you want to go next?

18 MS. BROWN: Yes.

19 CHIEF JUDGE SLEDGE: All right.

20 CROSS EXAMINATION (CONT'D)

21 BY MS. BROWN:

22 Q Good morning, Dr. Brynjolfsson.

1 A Good morning.

2 Q I would like to draw your
3 attention to page six of your report.

4 A Okay.

5 Q Section 2.2.2.

6 A Yes.

7 Q You state at the top, "I also have
8 focused on webcasters of significant size that
9 are actively seeking to maximize the long term
10 value of their enterprises" and you go on to
11 say that "The reasons for this are several
12 including that some small webcasters are
13 hobbyists or noncommercial enterprises and are
14 not seeking to make the maximum profit
15 possible through the use of sound recording."
16 Based on these statements, I take, Dr.
17 Brynjolfsson, that in your report you didn't
18 attempt to set rates for noncommercial public
19 radio stations, did you?

20 A It's not exactly right. I look at
21 what a market would be with willing buyers and
22 sellers and I concluded that the market rates

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1 would be primarily set by those companies that
2 you just described and that those rates would
3 likely apply to all webcasters.

4 Q And in your model, for purposes of
5 coming up with your Model 2, you focused on
6 webcasters that advertise or have
7 subscription-based programs. Isn't that true?

8 A Yes, I did.

9 Q And your Model 1 focuses on
10 similar webcasters. Isn't that true?

11 A That's correct.

12 Q And is it your understanding that
13 noncommercial entities either advertise or
14 have subscriptions?

15 A Not extensively. I do hear some
16 announcements on both stations. I guess they
17 call them underwriting.

18 Q Did you examine or review any
19 aspects of NPRs business when performing your
20 report?

21 A I visited the websites and just
22 ascertained that they were engaged in this

1 year the -- Or do you know that set of
2 projections was completed by AccuRadio?

3 A I don't off the top of my head. I
4 think I probably referenced it in the report,
5 but I can't remember. Do you know which page?

6 Q No. If you know the date that
7 that was prepared.

8 A I don't right now. As I sit here,
9 I think there's a deposition about it.

10 Q Do you know whether Mr. Hansen and
11 AccuRadio met its projections for the year
12 2005 in terms of revenue?

13 A No, I don't.

14 Q You speak about Mr. Hansen's
15 investors. Do you recall the discussion about
16 the investors that Mr. Hansen has brought into
17 AccuRadio?

18 A I recall reading in the
19 deposition. That's basically all I know.

20 Q Right, and there was a discussion
21 here when I objected about you talking about
22 confidential information. You mentioned the

1 amount of the investments that had been made
2 in AccuRadio. Do you recall that?

3 A I think so, yes.

4 Q Do you know whether those
5 investors have contributed any additional
6 funds to AccuRadio?

7 A No, I don't.

8 Q Do you know whether you mentioned
9 that Mr. or that AccuRadio was in the process
10 of trying to bring in new investors? Do you
11 recall that?

12 A That was my understanding.

13 Q Do you know whether they've been
14 successful in bringing in new investors?

15 A No, I don't.

16 Q In response to a question from Mr.
17 Steinthal about video gateways or video
18 prerolls on internet radio sites, you
19 mentioned AccuRadio's prerolls. Do you know
20 what their success rate was in 2005 in selling
21 video prerolls?

22 A If I remember correctly, I

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1 remember seeing them, but I don't remember --
2 I don't know what their success rate was.

3 Q And you've not personally talked
4 to anyone at AccuRadio about what their
5 success rate has been.

6 A No, I haven't.

7 Q And do you know what their success
8 rate has been in 2006 in selling video
9 prerolls?

10 A No, I don't.

11 MR. OXENFORD: No further
12 questions, Your Honor.

13 CHIEF JUDGE SLEDGE: Mr. Malone,
14 do you have any questions?

15 MR. MALONE: Yes please, Your
16 Honor.

17 CROSS EXAMINATION (CONT'D)

18 BY MR. MALONE:

19 Q Good morning, Dr. Brynjolfsson.

20 A Good morning. Good to see you
21 again.

22 Q Welcome to Washington again.

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1 A Thank you.

2 Q My questions are basically on the
3 demand side of the webcasting market that you
4 describe in your studies. I'll try to be as
5 precise as an amateur economist can be. Can
6 you explain to me -- Will you explain to me
7 what industry you're seeking to describe on
8 the demand side of your model?

9 A The buyers of --

10 Q Yes.

11 A Yes. Large commercial webcasters.

12 Q And if you look at paragraph 2.2.2
13 on page six of your report, you speak of the
14 larger record companies and on page 13, I
15 think you use the phrase "top tier."

16 A Could you point me to that?

17 Q All right.

18 A Yes, I see it actually there.
19 Yes.

20 Q And then on page 14 you speak
21 about 8,000 ATH.

22 A Yes, I do. AQH.

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1 Q I'm sorry.

2 A AQH, right?

3 Q All right. I guess you'd better
4 explain to me the difference between the two.

5 A An average quarter hour is the
6 number of people on average listening to a
7 radio station for at least five minutes during
8 any 15 minute period.

9 Q So ATH is?

10 A Is the total tuning hours during a
11 period typically say a month. So there's a
12 common conversion between the two on the
13 assumption that people listen for 18 -- at the
14 radio, that the relevant hours are 18 hours a
15 day from 6:00 a.m. to 12:00 midnight, 30 days
16 a week (sic). So if you multiply those
17 together, you can convert AQH to ATH.

18 Q And in the last sentence on page
19 14, you say, "This estimate is approximately
20 half the number I used in my analysis for a
21 webcaster of 10,000 AQH."

22 A Ah-ha. Yes.

1 Q And in the population of
2 webcasters, is the 10,000 a large operation?

3 A I would call it a medium sized
4 operation.

5 Q Then on page 21, you use the term
6 "largest."

7 A Can you help me to where that word
8 appears?

9 Q Yes. Above 3.4.2.1.

10 A Ah-ha (yes).

11 Q You say, you are referring there
12 to NetRadio.

13 A Yes.

14 Q And do you have at your fingertips
15 the ATH or the AQH for NetRadio in the period
16 of time you're talking about?

17 A No, I don't.

18 Q But it would be I take it from
19 what you say considerably larger than the
20 8,000 you're talking about -

21 A No, the market has grown a lot
22 since. I think it was one of the largest ones

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1 in the year 2000. Since then, the market has
2 grown tremendously.

3 Q So that would no longer be
4 considered quite as large.

5 A Correct.

6 Q And then, you used, you referred
7 to Ting and Wildman which is Services Exhibit
8 15 and there again, they're talking about
9 NetRadio with 10,000 AQH.

10 A Yes, I believe so. I could check
11 that. I'll take your word for it.

12 Q Then when you were last on the
13 stand, you talked about the term "out-of-range
14 data" and given the focus of your study, can
15 you quantify the range that it's applicable
16 to?

17 A What's applicable to?

18 Q Well, the analysis in your study
19 of large webcasters. How far can you
20 extrapolate on the two extremes?

21 A I believe that the market price
22 would really apply to everyone in that market.

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1 Q And is that simply an assumption
2 on your part?

3 A It's based on my understanding of
4 how the market works.

5 Q And to what extent is your study
6 based on the assumption of the availability of
7 video prerolls?

8 A I don't think it's very sensitive
9 to that.

10 Q And sell out rates?

11 A I don't think it's that sensitive
12 to any one, any single, item.

13 Q As to availabilities per hour?

14 A Same answer.

15 Q Let's look at that. Am I correct
16 in my understanding of your study that you've
17 simply assumed there are 15.36 musical works
18 per hour?

19 A Yes.

20 Q And do you have any data that
21 underlies this assumption?

22 A I believe this was the standard

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1 that was set at the CARP last time and it's
2 consistent with my own experience listening to
3 webcasting.

4 Q Is this a figure that's
5 chronologically as sensitive in the sense that
6 the CARP, that the determination on which you
7 rely has a certain data and today you said the
8 webcasting industry is evolving?

9 A I don't think -- No, I don't think
10 that the number of songs per hour change much.

11 Q As a long-time resident of the
12 Boston area or at least an intermittent
13 resident of the Boston area over some period
14 of time, are you familiar with the FM radio
15 station at Harvard WHRB?

16 A Yes, I am.

17 Q Are you aware of the fact that
18 WHRB carries broadcasts as the Saturday
19 matinee performances of the Metropolitan Opera
20 at Lincoln Center?

21 A No, I didn't know that.

22 Q Would you have an opinion as to

1 the number of works played by that station per
2 hour in comparison to the 15.36?

3 A No, I don't know what that would
4 be.

5 (Discussion off microphone.)

6 (Whereupon, the above-
7 referred to document was
8 marked as Services
9 Exhibit No. 103 for
10 identification.)

11 BY MR. MALONE:

12 Q Dr. Brynjolfsson, I've handed you
13 what has been marked as Services Exhibit 103,
14 roughly a dozen 8-1/2 X 11 pages. Looking at
15 the first couple of pages, are you able to
16 identify from the markings thereon what the
17 exhibit purports to be?

18 A Yeah. It appears to be from the
19 WHRB webpage.

20 Q And the first page that says
21 "Enter WHRB" is fairly typical of websites.

22 A It's not atypical.

1 Q Okay. And the focus of the first
2 few pages, in fact the focus of the entire
3 exhibit, appears to be a music orgy, a Mozart
4 orgy.

5 A Yes, that's what it says.

6 Q Looking then please to the fourth
7 page down, do you see what appears to be the
8 program schedule for the Mozart orgy?

9 A Yes.

10 Q And it begins at what time please?

11 A I believe it's 11:00 a.m. May 8th.

12 Q All right. Then if you turn to
13 the last page and you look at the top of the
14 right-hand column under the May 19th, what
15 time does the -- I'm sorry. If you look at
16 the bottom of the left-hand column, can you
17 ascertain what time the last portion of the
18 orgy was broadcast or will be broadcast?

19 A If I'm reading it correctly, it
20 says "10:00 p.m. May 18th" there.

21 Q And allowing for a couple
22 interruptions for the Memorial Church Service

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1 broadcast on Sunday and a couple of overnight
2 records, the hospital, would you accept that
3 there are 240 hours of the Mozart back-to-back
4 in that period?

5 MR. PERRELLI: I'm going to
6 object, Your Honor. The witness has not --

7 CHIEF JUDGE SLEDGE: Sustained.

8 MR. PERRELLI: Thank you very
9 much.

10 CHIEF JUDGE SLEDGE: Your next
11 question, Mr. Malone.

12 MR. MALONE: Well, I can ask the
13 witness if he would take pen to paper or
14 perhaps he can do it in his head and tell me
15 how many hours there are quickly from the
16 beginning time and the ending time.

17 THE WITNESS: A lot. It says it's
18 the largest project in WHRB's 65 year history.
19 So I guess it's some kind of a record.

20 BY MR. MALONE:

21 Q Well, forgiving the over
22 exuberance of youth. There are roughly, if we

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1 assume 10 days between May 8th and May 18th,
2 that's 240 hours. Is it not? A little bit
3 over.

4 A That would be correct.

5 Q And I will represent to you that
6 there are 700 different musical works being
7 performed during that period of time and the
8 question then is what's the average number of
9 works per hour?

10 MR. PERRELLI: Your Honor, I'm
11 going to object again. He's essentially
12 reading from a document that the witness
13 hasn't seen before today and asking him to
14 draw conclusions from it and based on a
15 representation of the number of hours and the
16 individual works that may be in this.

17 CHIEF JUDGE SLEDGE: It's
18 certainly an issue, but this question is can
19 he compute an average from two numbers and the
20 objection is overruled.

21 THE WITNESS: So what are the two
22 numbers you want to me to use?

1 BY MR. MALONE:

2 Q Well, you have 700 works and 240
3 hours and the question is how many works per
4 hour on the average?

5 A If there were 700 works and 240
6 hours, it would be I guess about -- That would
7 work out to be about three per hour, a little
8 bit less.

9 Q And so three per hour is less than
10 the 15.36 that appears in a number of places
11 in your study.

12 A Yes, it is.

13 Q All right. I'd like you to
14 examine some particular time periods here and
15 if you would look again please at the morning
16 of May 8th and the year is 1762 when we're
17 down around Koechel, K-O-E-C-H-E-L, Koechel 3
18 and can you infer from what you see under that
19 year whether all the recording being played
20 are digital?

21 A No. Actually I'm not sure exactly
22 where you referring to. 1762 you say?

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1 Q Yes. Look at the year 1762 and
2 look at the first four works played, Koechel
3 2, 3, 4 and 5.

4 A Okay.

5 Q And is there any sort of
6 designation there as to the source of the
7 recording that would indicate to you whether
8 they are digital or not?

9 A I'm not sure. No.

10 Q In other words, the LP doesn't
11 define your answer.

12 A That may have been the original
13 source was a long playing record.

14 Q All right. Fair enough. I'd like
15 then to return to the first question I asked
16 you in connection with paragraph 2.2.2 on page
17 six and ask you whether the phrase
18 "economically efficient result" is the only
19 criterion that you would apply as reflecting
20 the public interest in broadcasting.

21 A And just which paragraph is that
22 in exactly? Okay. The very last sentence

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1 there. Yes.

2 Q Yes.

3 A Right. Actually I didn't --

4 CHIEF JUDGE SLEDGE: I don't
5 understand the question.

6 MR. MALONE: He's being asked to
7 comment on the public interest of
8 broadcasting. Well, let me read the sentence
9 that we're looking at please, Your Honor, and
10 then -- The seventh sentence in 2.2.2 says
11 "Setting a single royalty rate at lower level
12 in order to accommodate smaller, less
13 efficient webcasters or webcasters with poor
14 business models would mean sacrificing higher
15 rates that could be earned from the more
16 profitable webcasters." My question to him is
17 whether the economically efficient result that
18 we see, I think, several points in his study
19 is the sole criterion that should be applied.

20 THE WITNESS: Actually it's not
21 the criterion applied at all. The criterion
22 I applied was what my best estimate of what a

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1 willing buyer and willing seller would agree
2 to. It turns out that that also happens to be
3 a economically efficient result.

4 MR. MALONE: I have no further
5 questions.

6 CHIEF JUDGE SLEDGE: Does that
7 complete the cross examination of each party
8 from direct testimony of this witness? Is
9 there any redirect, Mr. Perrelli?

10 MR. PERRELLI: There is, Your
11 Honor.

12 CHIEF JUDGE SLEDGE: All right.

13 REDIRECT EXAMINATION

14 BY MR. PERRELLI:

15 Q Good morning, Dr. Brynjolfsson.

16 A Good morning.

17 Q Tom Perrelli for Sound Exchange.

18 I want to start with some of the questions you
19 were asked about stream ripping, may which
20 were asked sort of more than a week ago.

21 A Yes.

22 Q Setting aside stream ripping, are

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1 there other reasons that you believe that
2 webcasting is likely to be substitutional for
3 CD sales?

4 A Yes, I mean for starters there's
5 just a finite amount of time people have
6 during the day and if they spend listening to
7 music in one form mathematically that means
8 there's less time to spend listening to music
9 in other forms.

10 Q And in your analysis, did you
11 quantify the impact that that substitution
12 might have on the rates that you proposed?

13 A No, I did not.

14 Q And why didn't you?

15 A As Professor Liebowitz pointed
16 out, it's important to have detailed data
17 before you make a lot of inferences and we had
18 good data on the, or reasonably good data, on
19 the costs and revenues but not a lot of data
20 to make quantifiable inferences on the extent
21 of substitution.

22 Q You were asked a number of

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1 questions about the Blackburn paper. Did you
2 use the Blackburn paper to quantify
3 substitution based on stream ripping or
4 webcasting?

5 A No, I did not.

6 Q Did you find the Blackburn paper
7 instructive in other ways for your analysis?

8 A Yes, I did. He highlighted a
9 point which I hadn't been quite as aware of
10 until I read his paper that there's a
11 tremendous amount of heterogeneity in the
12 effects on different artists. That was really
13 an important focus of his paper that some
14 artists were hurt, others were helped and that
15 made me think about how the same heterogeneity
16 would apply in other types of markets.

17 Q And how did that affect your
18 analysis with respect to spillovers or
19 promotion in webcasting?

20 A Well, it seems to me likely that
21 there is also a lot of heterogeneity in terms
22 of the effects of any promotion or

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1 substitution from streaming music and
2 therefore, any given policy is likely to miss
3 the mark for some, probably most, of the
4 artists and therefore, it would be
5 inappropriate to try to set a one-size-fits-
6 all policy to take care, to address promotion
7 and substitution issues.

8 Q And just so we're clear, what do
9 you mean by "one-size-fits-all"?

10 A Well, for instances, if one were
11 to find that there were some promotional
12 benefits for one particular artist in a
13 particular circumstance at a particular stage
14 in his career for a particular song when
15 combined with a particular set of other
16 promotions, advertising feature, whatever,
17 that does not necessarily mean that that same
18 level of promotion would apply to other
19 artists and so you wouldn't want to adjust the
20 royalty rate for all artists based on the
21 effects for one artist or some subset of
22 artists.

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1 Q You were also asked a number of
2 questions about Dr. Liebowitz's paper. Do you
3 remember that?

4 A Yes.

5 Q Can you take a look at page 18 of
6 Dr. Liebowitz's paper. I believe it's SX
7 0007312. This is Services Exhibit 101.

8 A Yes.

9 Q You were asked questions about
10 whether this paper talked about streaming at
11 all. I'd like to direct your attention to the
12 first full paragraph on page 18 which reads
13 "This conclusion is further supported by the
14 finding that radio play has historically had
15 little or no positive impact on record sales,
16 although it greatly influences which songs are
17 purchased." Do you have an understanding of
18 that research which cites to Dr. Liebowitz?

19 A Yes.

20 Q And what is that understanding?

21 A Well, it's exactly what he says in
22 this sentence that he did not find any

1 evidence that radio had a positive impact on
2 record sales.

3 Q Perhaps -- You were asked
4 questions by Mr. Oxenford about the AccuRadio
5 pro forma.

6 A Yes.

7 Q And I'd like to direct your
8 attention to SX Exhibit 40 to your amended
9 testimony and it's page 109 of the deposition
10 of Kurt Hansen to see if that refreshes your
11 recollection as to when Mr. Hansen's pro forma
12 was created.

13 A Yes. According to his deposition,
14 those projections were made in November 2005.

15 Q You were asked a series of
16 questions a week ago about "perfect
17 competition." What is that economic concept?

18 A That's the sort of idealized state
19 where you have a infinite number of infinitely
20 small buyers and sellers that compete and have
21 no individual power to affect the price, the
22 market price.

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1 Q And in a market where the marginal
2 costs that create the good is zero or near
3 zero, what would be the price in a world of
4 perfect competition?

5 A Well, if the sellers were selling
6 identical products, the price would be zero.

7 Q Now is that true in a real world
8 for copyrighted sound recording?

9 A No. I think that copyright is
10 explicitly created to prevent -- My
11 understanding is it was specifically created
12 to prevent that sort of thing from happening.

13 Q And so in the real world market
14 for copyrighted sound recording, what is the
15 role of bargaining power?

16 A It allows the sellers to capture a
17 share of the surplus created from their
18 copyrighted works.

19 Q And where does the copyright
20 owner's bargaining power come from?

21 A In large part from the legal
22 restriction that prevents competitors from

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1 copying their product and selling it in
2 competition.

3 Q Is it also a function of the value
4 of the copyrighted work?

5 MR. STEINTHAL: Objection, Your
6 Honor. Leading.

7 CHIEF JUDGE SLEDGE: Sustained.

8 BY MR. PERRELLI:

9 Q Are there other factors that go
10 into the bargaining power of sellers of
11 copyrighted goods?

12 A Well, it's going to depend on the
13 relative value of the product they sell as
14 well.

15 Q You were shown a portion of a
16 deposition transcript from an upcoming record
17 company's witness in this proceeding, Mr.
18 Kenswil, and asked to address his statements
19 about the ability of webcasters to operate
20 without a license from all four majors. Do
21 you remember that testimony?

22 A Actually, not really.

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1 Q Okay. Do you have a view about
2 whether a webcaster could be competitive in
3 the market for webcasting without a license
4 from all four major record labels?

5 A I think it would be difficult to
6 be successful especially for a lot of the
7 genres like top 40 where the consumers would
8 be expecting to be able to access music from
9 all four major labels.

10 MR. PERRELLI: I would like to ask
11 you to look at Exhibit 25 to your amended
12 testimony which is the deposition of Mr.
13 Roback and turn to pages 252 and 253 and this
14 page is marked "Restricted." I don't intend
15 to get into any numbers or financial data.
16 It's a question and answer about this topic
17 from Mr. Roback. Mr. Steinthal, I don't know
18 if you have any objections of having that on
19 the record.

20 MR. STEINTHAL: Why don't we take
21 one step at a time? Why don't you read the
22 question?

1 MR. PERRELLI: The question is
2 "Does the same" -- This is from Mr. Roback.
3 "Does the same need to have universal content
4 for the subscription service apply to, for
5 example, the free launch cast service?" And
6 then Mr. Roback gives an answer.

7 MR. STEINTHAL: That's okay.

8 BY MR. PERRELLI:

9 Q Let me complete the quote. "Does
10 the same need to have universal content for
11 the subscription service apply to, for
12 example, the free launch cast service?" Mr.
13 Steintal objects to form and then the answer
14 is "In order to really be in a competitive
15 service, yes, you need to have access to all
16 of the music in radio." Does Mr. Roback's
17 testimony square with your testimony?

18 A Yes.

19 Q You were asked a series of
20 questions about your treatment in your amended
21 testimony about revenues from the SBC-Yahoo
22 service. Do you remember that?

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1 A Yes.

2 Q I direct your attention to page 13
3 of your amended testimony.

4 A Yes.

5 Q And I would direct your attention
6 to the second full paragraph that begins
7 "Because..." and I would like to ask if that
8 refreshes your recollection as to how you
9 would attributed revenue from the SBC-Yahoo
10 service in your analysis.

11 A Yes. As it states, :I
12 conservatively assumed that the total number
13 of SBC subscribers equals the number that
14 actually use Yahoo service in any given
15 month."

16 Q So in your analysis, did you count
17 every single person who subscribed to the SBC-
18 Yahoo service?

19 A No, I did not.

20 Q And who did you count?

21 A Just the ones that we saw had used
22 the service in any given month.

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1 Q And just we're clear, when you say
2 "use the service," what service are you
3 talking about?

4 A The music service.

5 Q And again, just so we're clear,
6 the music service do you mean --

7 A Yes. The streaming radio music
8 service, Launchcast.

9 Q You were asked a number of
10 questions about whether you used or looked at
11 data from simulcasters. In your view, should
12 there be a different rate charged to companies
13 like Yahoo and companies like Clear Channel?

14 A In general, no.

15 Q Why not?

16 A From the consumer's perspective,
17 they can really switch between the different
18 ones and so if you were say subsidize or
19 penalize one, the consumers would have a
20 chance to arbitrage between the two. So that
21 usually isn't an effective way for a seller to
22 maximize his revenues.

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1 Q Are you aware of any activities
2 which Yahoo and Clear Channel, for example,
3 undertake together in order to operate their
4 webcasting services?

5 A No.

6 Q Are you familiar with a company
7 called Ronning Lipset?

8 A Yes.

9 Q And are you familiar with the
10 relationships between Ronning Lipset and Yahoo
11 and Ronning Lipset and Clear Channel?

12 A Yes.

13 Q And can you tell the Board what
14 those are?

15 A Ronning Lipset sells ads on these
16 stations, streaming radio ads.

17 Q And do you have an understanding
18 of how Ronning Lipset sells ads for its
19 various affiliates?

20 A I'm not sure I understand the
21 question.

22 Q I'll move on.

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1 A Okay.

2 Q You were asked whether you counted
3 revenue from banner ads shown on player that
4 were minimized. Do you remember those
5 questions?

6 A Yes.

7 Q Did you, in your analysis, did you
8 count any banner ads for which webcasters are
9 not compensated?

10 A No.

11 Q I want to go back a little bit to
12 the Model 1 particularly, but start and sort
13 of briefly cover a couple of topics and then
14 finish up. I want to ask you about your
15 overall methodology of modeling industry based
16 on publicly available data. Is that a common
17 approach in your field?

18 A Yes, it is.

19 Q And have you done that before?

20 A Yes, I have.

21 Q Okay. And can you give me an
22 example?

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1 A I'd say a large faction, perhaps a
2 majority of my MBA classes, this is the kind
3 of thing we do. We'll read a case study which
4 is prepared generally from publicly available
5 data which is a public document and it often
6 has the sorts of data that we described here,
7 excerpts from analyst's reports, newspaper
8 articles and then we spend class time
9 assessing the revenues, the costs, the
10 bargaining power, how things are likely to
11 proceed into the future. So that's a fairly
12 standard business school teaching process.

13 Q In addition to things like
14 analyst's reports, market research, did you
15 also look at how webcasters themselves
16 describe their businesses?

17 A Yes, I did.

18 Q And what did you find from those
19 descriptions?

20 A Well, after we did discovery, we
21 had a chance to see the actual numbers and by
22 and large, I came to the conclusion that I had

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1 been conservative in my estimates, for
2 instances, using the --

3 Q Dr. Brynjolfsson, you're going to
4 start using numbers and I'm not trying to --
5 I would prefer to keep this on the public
6 record if we can.

7 A So, yes, we found that we had been
8 conservative both on the cost side and on the
9 revenue side and in terms of the projections
10 going forward compared to what the webcasters
11 themselves had said.

12 Q Even before you had the
13 opportunity to review discovery, did you look
14 at what actual webcasters were saying about
15 their businesses?

16 A Yes.

17 Q And what did you find that they
18 were saying in the press?

19 A They seemed to be quite optimistic
20 about the potential of this industry.

21 Q And did you have the opportunity
22 to review their statements about their costs

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1 and revenues that were publicly reported?

2 A Well, the information that
3 appeared in the, ultimately appeared in places
4 like the radio and internet newsletter and the
5 analysts' reports were incorporated into the
6 report.

7 Q You were asked by Mr. Steinthal a
8 series of questions about Model 1, but
9 specifically Table 6 of your report and the
10 idea that royalties calculated there exceed
11 revenues. Can you explain what you were
12 attempting to show in Model 1?

13 A Sure. So Model 1 starts with the
14 assumption that the previous rate was set
15 correctly. Now that was a period during which
16 they were making losses. So the inference
17 would be that there were some other benefits
18 that spill over to their other businesses for
19 instance. So when we carried that forward,
20 the assumption was that those same spillovers
21 existed, the same indirect benefits existed in
22 the current time and we just adjusted for the

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1 visible changes in costs and in revenues and
2 updated the appropriate rate in light of that.

3 Q Did you ultimately use Model 1 to
4 propose the rate?

5 A No, I did not.

6 Q And with respect to Model 2, is
7 the rate that you calculate -- Strike that.
8 Let me start again. With respect to Model 2,
9 did you find that there was a surplus?

10 A Yes, I did.

11 Q And that was what you ultimately
12 used to propose the rate.

13 A Yes, I did.

14 Q Now with respect to Model 1, were
15 the conclusions that you drew in your initial
16 report confirmed by discovery?

17 A It was hard to get precise data
18 matching up what we had in the earlier
19 documents. The closest we had was the data
20 from Live365 and it appears that the costs
21 improved more rapidly than we had rejected and
22 the revenues improved more rapidly and the

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1 overall economic surplus increased by more
2 than what I had estimated in Model 1.

3 Q We talked a lot about developments
4 since 2001. Have you also seen developments
5 in the market for webcasting since 2003?

6 A The market has grown quite rapidly
7 in terms of revenues and the costs have come
8 down quite a bit since then as well.
9 Particularly just in discovery, we've had some
10 very recent information from Ronning Lipset
11 radio that it appears that the advertising
12 market is really exploding.

13 Q There was a lot of discussion
14 about fixed costs last week. In your
15 analysis, how significant of an impact do
16 fixed costs have on the overall profitability
17 of a webcaster?

18 A They are really not important. I
19 mean you could cut those numbers in half or
20 double them. It wouldn't have a material
21 effect on the profitability of the webcasters
22 and/or the ultimate rate, probably not more

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1 than a couple tenths of a percent.

2 Q And of the variable costs, what
3 did you find were the most important?

4 A By far, the biggest costs were the
5 bandwidth costs and of course, the royalties.

6 Q And what did you find with respect
7 to bandwidth costs in terms of the changes in
8 bandwidth costs from 2001?

9 A The evidence is that they are
10 significantly lower than what I projected and
11 have fallen to, consistently been, I think,
12 it's on the order of 40 percent lower than
13 what I used in my model.

14 Q You were asked a series of
15 questions about profit and loss statements
16 produced in discovery and you indicated that
17 you did not simply drop them into your model.
18 Can you explain to the Panel why not?

19 A Well, there are all sorts of
20 activities that webcasters undertake or any
21 large web company undertakes and what we
22 really wanted to focus on narrowly is the cost

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1 of producing the webcasting services and I
2 didn't see that broken out in a meaningful way
3 in any of the statements that I saw.

4 Q On the cost side, were you able to
5 determine whether expenditures were for
6 current operations or future investments?

7 A Well, we were able to get some
8 data, for instances, on the streaming costs
9 which most people consider to be the largest
10 costs and those as I mentioned we found were
11 significantly lower. That very large other
12 costs that I don't know what they were all
13 for, but some of the big part of it was for
14 future investments. To mention a company
15 that's not in this, I recently read that
16 Goggle is spending \$1.3 billion on developing
17 future technologies for their website and I
18 imagine a lot of the webcasters are engaged in
19 a lot of development of future services that
20 aren't essential for their current operations.

21 Q And when you reviewed those profit
22 and loss statements, did you find that

1 webcasters were attributing all of their
2 revenues in those statements to webcasting?

3 A No, I was actually surprised the
4 extent to which there seemed to be some very
5 large and significant revenues that were
6 economically dependent on webcasting that
7 weren't counted as part of their webcasting
8 revenues. I can give some examples if you
9 would like.

10 Q I think that --

11 MR. STEINTHAL: I couldn't hear
12 that.

13 THE WITNESS: I can give examples
14 if you would like.

15 BY MR. PERRELLI:

16 Q Are these examples in your written
17 testimony?

18 A Yes, they are.

19 Q Then I don't think we need to
20 belabor that.

21 A Okay.

22 Q You were asked some questions

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1 about flat fees and lump sum payments. Do you
2 remember those questions?

3 A Was that with respect to
4 satellite? I don't -

5 Q Don't go into them.

6 A No, I guess I don't recall.

7 Q Did you recommend a lump sum
8 payment as part of your rate recommendation?

9 A No.

10 Q Why not?

11 A First off, it's not what willing
12 buyers and willing sellers have been doing in
13 this market and I think there's a good
14 economic reason for that in that this is a
15 market that's growing very rapidly by all
16 accounts and it would be, the willing buyer
17 and seller would likely share in some of that
18 risk going forward and the natural way to do
19 that is to share the revenues and/or a per
20 stream number.

21 Q And when you talk about sharing
22 the risk, do both sides share the upside and

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1 the downside in your rate proposal?

2 A Yes, they do.

3 Q And how does that occur?

4 A Primarily through the revenue
5 share. So if revenues turn out to be higher
6 than expected, then they both get a share of
7 that increase and if both of them, if it turns
8 out to be lower, then they share in the
9 downside to a point. There's a floor.
10 There's a minimum. But the economic model is
11 based on a division of the surplus between the
12 two parties.

13 JUDGE WISNIEWSKI: Can I clarify
14 something here for a second?

15 MR. PERRELLI: Sure.

16 JUDGE WISNIEWSKI: When you talk
17 about this market growing at a fairly rapid
18 rate, which market are you talking about?

19 THE WITNESS: Webcasting.

20 JUDGE WISNIEWSKI: And then you
21 mentioned willing buyers and willing sellers.
22 Who are those willing buyers and willing

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1 sellers in that market?

2 THE WITNESS: The record labels
3 and the webcasters.

4 JUDGE WISNIEWSKI: I'm a little
5 bit confused by that. If webcasting is the
6 market that's growing, who are they selling
7 to? Are they selling to the record companies?

8 THE WITNESS: There are really two
9 markets. There's the webcasters selling to
10 consumers and to the advertisers.

11 JUDGE WISNIEWSKI: That's what I
12 thought. I think we're kind of mixing things
13 up here a little bit inadvertently perhaps.
14 If we could be clear about which markets we're
15 talking about and for which buyers and
16 sellers, that would be helpful to us.

17 THE WITNESS: Absolutely.

18 JUDGE WISNIEWSKI: Thank you.

19 BY MR. PERRELLI:

20 Q Let me -- In asking you about flat
21 fees or a lump sum payment, I was talking
22 about the market between record companies and

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1 webcasters to clarify the question. In that
2 market, what would be the effect of a lesser-
3 of royalty structure as between percentage of
4 revenue for a stream rate? How would that
5 affect the risk sharing?

6 A Well, it would be kind of the
7 worst of both worlds in that one of the
8 downsides of having the revenue share is that
9 if somebody is able to reallocated revenues to
10 another part of their business or is doing it
11 in a way that's efficient or is doing it not
12 to maximize profits, then there might be no
13 recorded revenues. So having the minimum is
14 a protection against that. But if you were
15 able to do the lesser of, you almost provide
16 an incentive for webcasters to do one or more
17 of those first strategies that I mentioned.

18 MR. PERRELLI: The Court's
19 indulgence just 20 seconds. I think that
20 concludes my redirect, Your Honor.

21 CHIEF JUDGE SLEDGE: Just to make
22 sure I understand your answer to Judge

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1 Wisniewski's question. The market that is
2 involved in the models that you have presented
3 in your recommended rates is the market
4 between the sellers of artists and labels and
5 the buyers of webcasting services and the
6 model that he asked you about that you've said
7 is expanding is the market of delivery of
8 services from webcasting services to
9 consumers.

10 THE WITNESS: Yes. Both those
11 markets are very closely linked. The reason
12 we are able to document it and that the
13 projections are by all parties that the market
14 between the webcasters and consumers and their
15 advertisers is going to grow very
16 dramatically, that will affect the derived
17 demand for music as an input into that. So
18 there's a very tight relationship between the
19 ultimate demand for the music by consumers and
20 the derived demand from the webcasters and
21 that's why I look at both of those markets in
22 particular. I look at the growth of the

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1 market with the consumers in order to make
2 inferences about how much value will be
3 created and therefore how much surplus will be
4 divided between the labels and the webcasters.

5 CHIEF JUDGE SLEDGE: Thank you.
6 All right. Mr. Steinthal, any further
7 questions?

8 MR. STEINTHAL: I do have some,
9 Your Honor.

10 CHIEF JUDGE SLEDGE: This would be
11 a good time to break. Thank you for glancing
12 at the clock.

13 MR. STEINTHAL: Well, I was
14 waiting for you.

15 CHIEF JUDGE SLEDGE: I appreciate
16 it. I'm afraid I don't look at it closely
17 enough. We'll recess ten minutes. Off the
18 record.

19 (Whereupon, the foregoing matter
20 went off the record at 11:08 a.m. and went
21 back on the record at 11:20 a.m.)

22 CHIEF JUDGE SLEDGE: Thank you.

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1 We'll come to order.

2 Mr. Steinthal?

3 MR. STEINTHAL: Thank you, Your
4 Honor.

5 RE CROSS EXAMINATION

6 BY MR. STEINTHAL:

7 Q Good morning, Dr. Brynjolfsson.

8 A Good morning.

9 Q I'm just going to go through a
10 couple of things you said in response to
11 counsel in sequence. So the same sequence as
12 counsel did.

13 First, you gave some testimony
14 concerning one basis for your conclusion as to
15 substitution from webcasting that people have
16 a finite amount of time. So if they're
17 listening to webcasting, they may not be
18 purchasing records and listening to records
19 they purchase. Is that the inference you're
20 trying to draw?

21 A Yes.

22 Q Now, did you consider at all, in

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1 your analysis of this, if you did it at all,
2 how common it is for listeners to webcasting
3 to listen at work because they can put the
4 music on their computer, minimize or turn the
5 volume off when they want to, and thus listen
6 to music in a way they had never previously
7 listened to music?

8 A I didn't explicitly consider that,
9 no.

10 Q So hypothetically, if there are a
11 number of users that go to their office and
12 that don't have stereos in their office and
13 never listen to CDs in their office, prior to
14 the advent of statutory webcasting and simply
15 put on their Yahoo radio station or their AOL
16 station and then minimized, turn it down when
17 the phone rings or something like that, you
18 would agree with me that if there's a category
19 of demand that never existed before for such
20 listening, that wouldn't be reflective of a
21 substitutional aspect?

22 A I'm not sure I agree with the

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1 premise that there aren't other ways to
2 listen. People listen on iPods to music they
3 purchased, a lot of ways at work, in my
4 experience, people do that.

5 Q But you did no analysis of
6 listening habits and to what extent people
7 listen to statutory webcasting in a fashion
8 very different than they used to listen to
9 music. Isn't that right?

10 A That's correct. I didn't do any
11 analysis of that.

12 Q Now, you mentioned that one of the
13 reasons why and let me bring you back to
14 context. You were talking a little bit about
15 perfect competition and that the price would
16 be zero in a world of perfect competition. Do
17 you remember generally saying that?

18 A Yes.

19 Q And you said one of the reasons
20 why you said that couldn't be the case is that
21 you relied on the purpose of copyright as
22 giving the copyright owners the labels and

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1 ability to capture some part of the surplus,
2 right?

3 A Yes, that's my understanding.

4 Q Did you do any analysis of the
5 legislative history underlying the statutory
6 license?

7 A Analysis of the legislative
8 history? I mean I read the opinions.

9 Q I'm not talking about the opinion
10 in the prior CARP. I'm talking about the
11 legislative history underlying the statutory
12 license for webcasting.

13 A I reread a portion of the
14 Constitution that established copyrights as to
15 what its purpose was.

16 Q Stick with me here. I'm asking
17 whether you read any legislative history
18 surrounding the passage of the Digital
19 Performing Rights and Sound Recordings Act or
20 the Digital Millennium Copyright Act, as it
21 relates to statutory licenses under Section
22 114?

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1 CHIEF JUDGE SLEDGE: Surely the
2 Constitution is the constitutional legislative
3 history of statutes.

4 (Laughter.)

5 MR. STEINTHAL: I don't think the
6 Constitution is legislative history as to
7 something that occurred in 1995 and 1998, Your
8 Honor.

9 JUDGE WISNIEWSKI: You don't see
10 it as a living document?

11 (Laughter.)

12 MR. STEINTHAL: Do I have to
13 answer that question?

14 (Laughter.)

15 BY MR. STEINTHAL:

16 Q So let me cast it again. I'm
17 trying to find out whether you did any review
18 or analysis of the legislative history of
19 either the DPSRA as we call it every now and
20 again, the 1995 Digital Performing Rights Act
21 or the 1998 Digital Millennium Copyright Act
22 as it relates to the statutory licenses here

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1 at issue.

2 A I read a number of documents to
3 try to understand the context of where the
4 opinions and where they mentioned it. I did
5 re-read the Constitution, that portion of it
6 to try to understand the intent, and I assume
7 that Congress was influenced by that intent.
8 But I didn't do an extensive detailed, sort
9 of, legal search.

10 Q All right. You mentioned, well, I
11 gather that as you sit here today you don't
12 recall having looked at that legislative
13 history, right?

14 A Other than what I've already
15 answered.

16 Q Now in your testimony this
17 morning, you mentioned that there are a lot of
18 public reports about optimism among webcasters
19 in recent times. Is that right?

20 A Yes.

21 Q Now in the public reports that
22 you're referring to, can you be specific as to

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1 whether it was, you know, public reports about
2 AOL or Yahoo or Microsoft, for example?

3 A Not as I sit here right now.

4 Q And can you discern in your mind
5 whether the public reports were about optimism
6 about Yahoo generally or Yahoo concerning just
7 the statutory license webcasting product here
8 involved in this case?

9 A My recollection was that, for
10 instance, that Radio and Internet Newsletter
11 was very optimistic about webcasting in
12 general.

13 Q Do you recall any specific
14 publication other than the Radio and Internet
15 Newsletter that spoke about the optimism to
16 which you referred in your testimony?

17 A Well, there were projections
18 described in the report from AccuRadio, from
19 AccuStream.

20 Q I'm asking you specifically about
21 the public reports that you testified about
22 this morning. Can you specify any other than

1 the RAIN piece that you just referred to?

2 A I don't remember right now.

3 Q Now you were asked some questions
4 about Model 1, and I believe you testified
5 this morning that you concluded from the fact
6 that webcasters were losing money under the
7 prior CARP rate, that there was some indirect
8 benefits that they were deriving? Is that a
9 fair statement?

10 A I looked at the analysis under the
11 assumption that the previous rate was set
12 accurately reflecting what a buyer and seller
13 would agree to at that point. So the
14 inference would be that there was sufficient
15 benefits at that point for the buyers to agree
16 to that agreement.

17 Q I think the gist of what you were
18 saying was that since you observed that the
19 webcasters were losing money, that there must
20 be some indirect benefit that they were
21 deriving or else they wouldn't have stayed in
22 business, right?

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1 A Yes.

2 Q Now isn't it possible, sir, that
3 webcasters that had made significant
4 investments in webcasting and who hoped two
5 things would happen in the future: number
6 one, that they would be able to derive greater
7 revenues as the market grew; and secondly,
8 that certain of their costs including
9 particular bandwidth would come down.

10 Isn't it possible that instead of
11 staying in business because there were these
12 indirect benefits, they stayed in business
13 because of both of those hopes: A, more
14 revenue, and B, less cost?

15 A We considered scenarios, you know,
16 I did analysis where what would happen if we
17 considered no indirect benefits and we came up
18 with the rates that were the ones that we used
19 in reports. So we looked at a lot of
20 different scenarios.

21 Q But isn't what I just asked you a
22 possibility? One reason why webcasters may

1 have stayed in business, having nothing to do
2 with indirect benefits?

3 A I think it's more complicated than
4 that. I think that the original agreement
5 didn't extend all the way to 2005, so I don't
6 think that they would, originally, as I
7 understand it, it was only going to be until
8 I think it was 2003. So the extent to which
9 there were decreases in cost and so forth
10 after that, it's not, it doesn't make sense
11 that they would have factored those in because
12 the rate was up for being reset by 2003. So
13 I don't think that they would have necessarily
14 considered changes far into the future.

15 Furthermore, it appears that
16 companies can enter at a later date.
17 Companies are entering today so there's no
18 necessity to sink an investment five years ago
19 in order to do webcasting today.

20 Q Who is investing today? Name one
21 statutory webcaster that you're aware of
22 that's come into the market to do statutory

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1 license webcasting in the last year or two?

2 A I believe there are 480 Clear
3 Channel stations that have entered the market.
4 I read just in the newspaper recently that I
5 think MTV has starting a streaming service
6 now. So I think there are ones that are
7 entering.

8 Q Are you familiar with the fact
9 that MTV has been one of the largest streamers
10 of statutory license radio since 2000 and
11 before?

12 Isn't the article you read about
13 the new service called Urge, which is an
14 interactive service, not a statutory license
15 service?

16 A They have a streaming component,
17 according to the brief news report that I saw.

18
19 Q You don't know whether it's on
20 demand or not, do you?

21 A I believe they have a whole set of
22 services, according to the newspaper article

1 I saw.

2 Q Well sir, let's be precise here.
3 The fact is and if you don't know, you don't
4 know. Do you not know whether MTV was
5 streaming under the statutory license in 2000,
6 2001, 2002, 2003, 2004 and 2005?

7 A This service that you mentioned,
8 Urge, as I understand it, didn't exist before.
9 It's being set up now.

10 Q And is it your testimony, under
11 oath, that Urge is operating a statutorily
12 licensed service as opposed to a much more
13 interactive offering?

14 A What I saw in the news article was
15 that they were offering a streaming service,
16 as well as other services.

17 Q Sir, can you answer my question?
18 Is it your testimony that Urge is a service
19 that operates under the statutory license or
20 that Urge, in fact, is a product offering that
21 requires voluntary licensing from the labels?

22 MR. PERRELLI: Objection, Your

1 Honor.

2 MR. STEINTHAL: Or do you not
3 know?

4 MR. PERRELLI: I think he's asked
5 and answered several times.

6 CHIEF JUDGE SLEDGE: No sir.
7 Please answer the question.

8 THE WITNESS: What I saw in the
9 article was that they were offering a
10 streaming service in addition to other
11 services.

12 BY MR. STEINTHAL:

13 Q And you don't know what kind of
14 streaming services, right?

15 A No, I don't.

16 Q All right, let me go back. You
17 said that companies are coming into this
18 market still today, other than MTV, and we'll
19 adduce some evidence as to what the Urge
20 service is in light of your testimony. Do you
21 know of any other entities coming into this
22 market? You mentioned Clear Channel with

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1 respect to simulcasting?

2 A Yes.

3 Q Other than Clear Channel?

4 A Well, we also saw that AccuRadio
5 is entering the market or has entered the
6 market since the last, since the rate was
7 initially set.

8 We also saw that AccuRadio entered
9 the webcasting business since the last rate
10 was set.

11 Q Your testimony was that entities
12 are coming in today. AccuRadio has been
13 around for a few years now, hasn't it?

14 CHIEF JUDGE SLEDGE: Mr.
15 Steinthal, I've got to interrupt. You started
16 this question. It wasn't based on an answer
17 that he gave.

18 MR. STEINTHAL: He, Your Honor, in
19 response to my question talked about how
20 people are still coming in today in this
21 market and I'm baffled and I'm asking if he
22 can give us any kind of --

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1 CHIEF JUDGE SLEDGE: No sir. I
2 don't believe the record supports what you've
3 just said. You asked the question "do you
4 know of anybody that has come into this
5 market?" And he said, the answer he gave that
6 you're now exploring. That wasn't preceded by
7 a statement by him that new people are coming
8 into the market.

9 MR. STEINTHAL: With all due
10 respect, Your Honor, if we could go back to
11 the transcript, I believe the witness said in
12 response to my question which was probing why
13 webcasters would have stayed in business
14 before, that they're still coming in today.
15 That's what I'm following up on.

16 CHIEF JUDGE SLEDGE: No sir. He
17 said that they did not need to come into the
18 business five years ago in order to come into
19 or be in the business today.

20 MR. STEINTHAL: Your Honor,
21 believe me, I don't want to argue with you,
22 but when the transcript comes in --

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1 CHIEF JUDGE SLEDGE: Let's assume
2 he said what I said and then go on with your
3 questions, but not based on the fact that he
4 said that today people are investing into the
5 market.

6 MR. STEINTHAL: Okay, fair enough.

7 CHIEF JUDGE SLEDGE: Your free to
8 ask him who is coming into the market, but --

9 MR. STEINTHAL: I wouldn't have
10 done that had I not heard something from him,
11 Your Honor, but let me go back to the -- what
12 got us down here was a question that I don't
13 think you've really answered with all due
14 respect which is whether one of the reasons
15 why entities that were losing money under the
16 prior CARP decision in 2002, would have stayed
17 in business other than the concept of indirect
18 benefit, would have been because they felt
19 they had an opportunity to lower their
20 existing costs and increase their revenues
21 while operating under the prior statutory
22 rate.

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1 BY MR. STEINTHAL:

2 Q Isn't that one reason that could
3 have --

4 A Yes, I think that could be one
5 reason.

6 Q And in fact, to the extent that
7 there were stand alone webcasters who had no
8 indirect benefits like you testified exist for
9 a portal, you would expect that that's why
10 they stayed in business, wouldn't you?

11 A No.

12 Q Now you mentioned in response to
13 some of counsel's questions that there were
14 developments since 2003 and you cited
15 specifically Ronning Lipset Radio, correct and
16 the growth of their involvement and the growth
17 of revenues that they helped sell, right?

18 A Yes.

19 Q That's just instream audio, right?

20 A That's correct.

21 Q And you talked about bandwidth
22 costs coming down in response to Counsel's

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1 questions, correct?

2 A Yes, I did.

3 Q Now is it correct, sir, that under
4 your model, the way it works is that if
5 webcasters save 100 units of cost in
6 bandwidth, the labels actually benefit 75 of
7 those units, don't they?

8 A Yes, we call units dollars, yes.

9 Q So again, going back to the
10 hypothetical webcaster that stayed in business
11 because they felt that they might be able to
12 increase revenues and decrease their costs,
13 and in particular, have in mind the ability to
14 decrease their bandwidth cost, if they hadn't
15 done any kind of economic modeling in their
16 head like you, such that they didn't figure,
17 well, for every dollar I save on bandwidth I'm
18 really only saving a quarter, because I have
19 to give those costs over to the labels. That
20 would really change their equation too,
21 wouldn't it, if they hadn't considered that
22 for every dollar saved in bandwidth, they'd

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1 really only get a quarter?

2 A I think a rational businessman
3 would know that their competitors were going
4 to be making investments and taking advantage.
5 If they wanted to stay in business, they are
6 going to have to compete in the market place
7 at what other willing buyers and sellers are
8 doing.

9 Q Your testimony that a rational
10 webcaster in 2002 should have counted on
11 having to give 75 percent of their bandwidth
12 cost savings to the labels?

13 A I think a rational business person
14 in 2002 would have understood that the
15 agreement was up for negotiation and
16 renegotiation being reset, and at that point
17 the price would be set based on what a willing
18 buyer and seller would agree to at that point.
19 If they are a good business person, they would
20 have considered what the economic
21 circumstances would be at that point.

22 Q If I achieved some significant

1 bandwidth cost savings between the time the
2 CARP decision was rendered in 2001 and two
3 years later when the voluntary agreement was
4 entered into between the recording industry
5 and the DiMA companies, and then in 2003, that
6 voluntary agreement occurred at the same or
7 even somewhat a rate than the original CARP
8 decision, you're telling us that a rational
9 business person who would have saved dollar
10 for dollar on those bandwidth costs between
11 2002 and 2003, should have realized that in
12 the future all of the additional bandwidth
13 costs, they were only going to get a quarter
14 out of every dollar they were going to save?

15 A If the market was evolving in that
16 direction, that's the price that they would
17 have to meet. If they didn't save at least
18 that much, they would actually be at a
19 disadvantage. If other competitors saved
20 more, that could make it even harder for them.
21 So it would be in their interest to try to
22 save as much as they could.

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1 Q You said the lesser of formula
2 was, and I wrote this down, the worst of both
3 worlds. Remember that?

4 A Yes.

5 Q Now would you agree, sir, that if
6 somebody got the benefit of a lesser of
7 formulation, then the percentage in the lesser
8 of formulation would actually overstate the
9 true percentage, or the true value of the
10 percentage rate because you could choose per
11 performance or a per hour rate instead?

12 A You're talking the buyer or
13 seller? I mean, be a little more specific.

14 Q The buyer.

15 A So if a buyer --

16 Q Gets the benefit of a lesser of.

17 A So they could choose which way to
18 pay. Yes.

19 Q You agree with me that the
20 percentage would overstate the true number
21 because you could always choose something
22 lower, right?

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1 A The true number. I'm not sure
2 what you mean by the true number either.

3 Q Well, if the buyer gets the
4 benefit of a lesser of, X percent of revenue
5 or Y per hour or Z per play, then it can
6 choose various mechanisms which might actually
7 result in fees under the X percent of revenue,
8 right?

9 A Right, sir. By definition.

10 Q So by definition the 10.9 is a
11 ceiling. The effective rate is likely to be
12 lower because licensees have the option of
13 choosing one or the others, right?

14 A The 10.9, I'm not sure what you're
15 referring to.

16 Q Let's assume, let's go back to
17 reality, which is 2003 to 2005, when webcasters
18 have the option, as you know, to choose if
19 they have a statutory license subscription
20 service, 10.9 percent of revenue or 1.1 cents
21 per hour, or 0.07 cents per performance,
22 right?

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1 A I'll take your word for it.

2 Q If they had that option during
3 that period, then in fact, the 10.9 would
4 overstate the true effective rate because
5 licensees could choose either the 10.9 or one
6 of those two other alternatives, right?

7 A Yes.

8 Q Now when you testified that a
9 lesser of is the worst of all worlds, or the
10 worst of both worlds, you mentioned that
11 people operating under the percentage could
12 basically choose not to derive revenue and
13 thereby get away without paying much of a fee,
14 remember saying substantially that?

15 A Something similar to that, yes.

16 Q Did you consider that there are
17 ways in a lesser of formulation to have, for
18 example, as part of a percentage of revenue
19 calculation a per sub minimum that applies so
20 that if you choose the percentage rate, you
21 can't do exactly what you're talking about
22 because if you drive the rate down too low or

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1 if you drive your revenue down too low, you'll
2 always have to pay a minimum per subscriber,
3 like the pre-existing 27 cents per subscriber
4 rate?

5 A So you're saying a system where
6 you have the lesser of, but you also have the
7 greater of, of some components in some sense
8 to make it a more complicated scheme?

9 Q Well, let's take the pre-existing
10 scheme. Let's take the facts. Isn't it true
11 the 10.9 percent of revenue piece of the
12 lesser of option under the prior statutory
13 license provided that if you chose the 10.9
14 percent revenue option, under no event would
15 you pay less than 27 cents per subscriber.
16 Are you familiar with that?

17 A Not in detail.

18 Q You would agree with me that if
19 there's a per sub minimum, to protect against
20 precisely the concern that you talk about,
21 that would deal with the issue of companies
22 driving too low a rate, right?

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1 A They have some of the same
2 features of what I was -- yes, exactly what I
3 was describing. Because you've got a
4 guaranteed minimum there.

5 Q And did you confer at all with any
6 of the label representatives that approved in
7 2003 a lesser of formula or a licensee option
8 formula in the nature we've just been talking
9 about to see whether they viewed that as being
10 the worst of all worlds when they approved it
11 in 2003?

12 A No, I didn't.

13 MR. STEINTHAL: I have no further
14 questions, Your Honor.

15 CHIEF JUDGE SLEDGE: Any further
16 cross by the Radio Broadcasters?

17 MR. JOSEPH: Yes, Your Honor.

18 BY MR. JOSEPH:

19 Q Now Dr. Brynjolfsson, you cited
20 AccuRadio as one of the new entrants. Isn't
21 it a fact that AccuRadio doesn't pay fees
22 under the rates set by the CARP. It pays fees

1 under the Small Webcaster Settlement Act,
2 which are significantly lower?

3 A I believe that's true.

4 Q You also cited RAIN as a source of
5 your optimistic comments for webcasting. RAIN
6 is published by Kurt Hansen, correct?

7 A Yes, it is.

8 Q I believe in your deposition you
9 referred to Mr. Hansen and I think these were
10 your words "industry expert", but you've never
11 met Kurt Hansen, have you?

12 A I have not met with him.

13 Q And at the time you wrote your
14 report, you cited RAIN for the various things
15 you cited it for, you didn't know Kurt
16 Hansen's qualifications or -- I'm sorry, his
17 education or his professional qualifications,
18 did you?

19 A I read a large number of his
20 reports and I based my assessment on what I
21 had read that he had written.

22 Q But you didn't know his education

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1 or his professional qualifications, did you?

2 A I don't recall whether he stated
3 that in any of those reports.

4 Q Do you remember my asking you that
5 question at your deposition and -- well, let
6 me just ask if you remember and if not, we can
7 hand you the pages.

8 A No, I don't.

9 Q You don't remember me asking you
10 those questions at your deposition?

11 A Not specifically.

12 Q And you don't remember saying that
13 you don't know his educational or professional
14 qualifications?

15 A I remember saying that.

16 Q It's probably not worth taking the
17 time of the Court --

18 CHIEF JUDGE SLEDGE: That is what
19 he said today.

20 BY MR. JOSEPH:

21 Q But you say you relied on, you saw
22 what he said in this report. Do you have any

1 knowledge of the editorial controls RAIN uses
2 to screen information that it puts into the
3 newsletter?

4 A Nothing other than what I can
5 infer from reading the reports.

6 Q And do you have any knowledge of
7 the editorial controls they use to verify the
8 information in the newsletter?

9 A What he appears to do is speak to
10 a lot of people in the industry and oftentimes
11 will cite and quote a number of people on a
12 particular topic and I have no reason to
13 believe that those quotes were not true and
14 that when -- often when he makes a point he
15 will draw on a number of different sources in
16 that way.

17 Q And often he doesn't also,
18 correct?

19 A Yes, that's correct.

20 Q Now it's true, is it not that you
21 built your model assuming that the sellers
22 were primarily the four major record companies

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1 that control approximately 80 percent of the
2 sales of recorded music, correct?

3 MR. PERRELLI: I object, Your
4 Honor. I think this actually goes beyond the
5 scope of the redirect.

6 MR. JOSEPH: May I have a moment,
7 Your Honor, because I believe there were
8 questions on it?

9 (Pause.)

10 Your Honor, the witness was asked
11 the questions of perfect competition in the
12 real world, the role of bargaining power, and
13 he talked about what bargaining power comes
14 from, among other things, the legal
15 restrictions that prevent competitors from
16 copying. He was asked if there were other
17 factors depending on the relative value of the
18 price to the seller.

19 In fact, in his written statement
20 he very specifically said that the power came
21 because the major record, each of the major
22 record companies has a substantial share of

1 the recordings, and I was inquiring in that
2 direction.

3 So it goes directly to the
4 question of where the bargaining power comes
5 from that Mr. Perrelli asked about.

6 CHIEF JUDGE SLEDGE: There's
7 probably a small one that you can ask there.
8 Overruled.

9 BY MR. JOSEPH:

10 Q Well, Dr. Brynjolfsson, let me ask
11 you to assume hypothetically that instead of
12 four major record companies with 80 percent of
13 the market, there were 100 record companies
14 each with one percent of the market, and that
15 the catalogues of each of those record
16 companies were comparable in quality and
17 quantity of music, and that a webcaster would
18 not need the license to catalogue at all to
19 have a successful service.

20 All other things being equal,
21 you'd agree, would you not, that such a market
22 would likely present a very different willing

1 buyer, willing seller negotiation than the
2 market that you build in your market, correct?

3 A I wouldn't say very different. It
4 really depends a lot, I think primarily on the
5 value of those, I mean there are certain sound
6 recordings by the Beatles or Madonna that
7 could be very valuable individually even if
8 they constitute less than one percent of the
9 market. Consumers aren't necessarily just
10 looking for quantity, they're looking for
11 specific quality.

12 So I think it's fair to say that
13 there would be some differences, but there
14 would also be a lot of similarities.

15 Q Have you done any analysis on what
16 specifically consumers are looking for in
17 terms of music?

18 A Based on my judgment, you know, I
19 teach courses on this. I had a class, you
20 know, a couple classes this semester, one for
21 PhDs and one for MBAs where we talked about
22 the music industry and competitors. So it's

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1 based on my judgement of -- my understanding
2 of the industry.

3 Q No analysis?

4 A I think what we do in class could
5 be considered analysis.

6 Q You're talking about what you do
7 in class though?

8 A Excuse me?

9 Q That you're talking about what you
10 do in class.

11 A And in preparation for that, yes.

12 Q Okay, now you also, I believe,
13 testified that the evidence you saw was that
14 bandwidth costs were significantly lower,
15 consistently on the order of 40 percent than
16 what you have used in your model. This is
17 from the data that you were, you saw in
18 Discovery. I believe that was your testimony
19 to Mr. Perrelli?

20 A I think that's correct. Yes.

21 Q Let me hand you a document that
22 has been marked restricted, but I'll limit my

1 questioning to that which I don't think we
2 need to close it off.

3 Dr. Brynjolfsson, in reviewing
4 data produced in Discovery, did you see this
5 document?

6 A I don't recall.

7 Q Do you recall seeing an agreement,
8 Clear Channels agreement for bandwidth that
9 provides for a price at the highest usage
10 level of \$410 per terrabyte, which I believe
11 translates into 41 cents a gigabyte?

12 A No, I don't recall.

13 Q Who decided which documents you
14 saw from those that were produced in
15 Discovery?

16 A We had a team of people. As I
17 mentioned, Professor Bakos and others, we went
18 through a lot of different documents. I don't
19 recall this specific document.

20 Q And on page 17 of your original
21 written testimony, you modeled that the price
22 per gigabyte for a large webcaster in 2006

1 would be 16.88 cents, correct?

2 A I'm sorry, which page?

3 Q 17.

4 A And yes, so for 2006?

5 Q Yes, sir.

6 A Price per gigabyte, yes, 16.88
7 cents. Exactly.

8 Q So if, in fact, 41 cents per
9 gigabyte was what Clear Channel was paying,
10 that wouldn't exactly be 40 percent less than
11 the 16.88 cents you modeled, would it be?

12 A No, it wouldn't be.

13 Q I have no further questions, Your
14 Honor.

15 CHIEF JUDGE SLEDGE: Ms. Brown,
16 any additional questions?

17 MS. BROWN: No, Your Honor.

18 CHIEF JUDGE SLEDGE: I believe no
19 one else is present to cross examine. All
20 right. That completes the questions of the
21 parties to Dr. Brynjolfsson.

22 Judge Roberts, any questions?

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1 JUDGE ROBERTS: I just have one
2 question, Dr. Brynjolfsson. I understand from
3 your testimony that you, for your models that
4 you focused on the largest commercial
5 webcasters?

6 THE WITNESS: That's correct.

7 JUDGE ROBERTS: Is it, since I'm
8 not an economist, is it standard practice in
9 the field of economics to focus with your
10 looking at a market to focus on the large
11 players in the market if you're trying to set
12 a price?

13 THE WITNESS: What you want to
14 focus on is the people who are going to be
15 setting the relevant price. Often, those are
16 the large webcasters that you're looking at.

17 JUDGE ROBERTS: I just mean in
18 general.

19 THE WITNESS: In general? I think
20 most often the people who have a dominant
21 market share who are doing most of the buying,
22 most of the selling, are the ones that are

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1 going to be in a position to set the market
2 prices.

3 JUDGE ROBERTS: So, for example,
4 if I was trying to determine the price for
5 hammers, let's say, would I look at what the
6 manufacturers of hammers, what they charged to
7 say Home Depot and Lowe's and WalMart for
8 determining what the price was of hammers?

9 THE WITNESS: It would depend on
10 whether or not it was possible to sort of
11 arbitrage the different markets. So if you
12 could isolate a market, separate from the
13 other markets, you might see different prices.
14 On the other hand, if it was sort of a
15 national market that people could go to to buy
16 hammers, then probably those big companies
17 would be the main people to set the prices,
18 yes.

19 JUDGE ROBERTS: So by dividing
20 those markets, for instance, if I lived in an
21 area where there wasn't an Lowe's or a Home
22 Depot or a WalMart and I had to go to a local

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1 hardware store, that's a different market?

2 Because certainly it has a different price.

3 THE WITNESS: Yes.

4 JUDGE ROBERTS: Than the WalMarts
5 and the Lowe's.

6 THE WITNESS: Exactly. That would
7 be an example of where there might be well a
8 different price because you wouldn't have the
9 WalMart -- but if the WalMart moved into town,
10 then that would probably quickly set the
11 price.

12 JUDGE ROBERTS: Okay, so you can
13 have different markets for one product?

14 THE WITNESS: Yes, certainly. I
15 mean they could be geographically separate.

16 One of the things that the
17 internet has done, a lot of markets and I've
18 done a lot of research on this is just is
19 lowered the geographic barrier, so to speak.
20 So it's less and less possible than it used to
21 be.

22 JUDGE ROBERTS: All right, thank

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1 you.

2 THE WITNESS: Sure.

3 CHIEF JUDGE SLEDGE: Judge
4 Wisniewski?

5 JUDGE WISNIEWSKI: Just a few
6 questions, Dr. Brynjolfsson.

7 I want to focus on to begin with
8 on page 6 of your direct statement.

9 THE WITNESS: Yes.

10 JUDGE WISNIEWSKI: Where you talk
11 about product characteristics.

12 THE WITNESS: Yes.

13 JUDGE WISNIEWSKI: And I take it
14 your -- well, rather than I take it your --
15 I'd rather have you tell me, in terms of the
16 product that you talk about under this
17 heading, are you talking about or defining the
18 input market product that is the input itself,
19 the market for input itself?

20 THE WITNESS: In this case, it's
21 what the labels would be selling to the
22 webcasters.

1 JUDGE WISNIEWSKI: Okay. So could
2 you tell me what that product is?

3 THE WITNESS: It's the blanket
4 license to the sound recordings that the
5 labels have.

6 JUDGE WISNIEWSKI: The actual
7 license?

8 THE WITNESS: Yes.

9 JUDGE WISNIEWSKI: How would we
10 measure the license in units?

11 THE WITNESS: Well, it would be
12 the value of that license would be a function
13 of the value it would ultimately create in the
14 downstream market.

15 So I think a way of measuring that
16 would be the amount of music that could be
17 listened to by the end consumers. So that
18 would vary depending on how --

19 JUDGE WISNIEWSKI: So is that
20 units of sound recordings or units of plays?

21 THE WITNESS: If the value of the
22 sound recording is going to be a function of

1 the number of plays that can be done with it.

2 JUDGE WISNIEWSKI: So you suggest
3 that would use the plays as the unit, is that
4 --

5 THE WITNESS: Well, actually what
6 would really drive the value of it is what the
7 webcasters or others for that matter could --
8 what value they could get from that license
9 and currently, the main way to monetize that
10 value, that input is through playing it and
11 counting the number of plays is a good proxy
12 for that. That shows up in the subscriptions
13 and the advertising revenue that can be
14 earned.

15 Now conceptually, it may be that
16 the consumer may have some value just from
17 sort of the option value of being able to, you
18 know, I can turn on the radio or turn on my
19 webcasting internet radio and know that I
20 could listen to one of those million or two
21 million songs. Some consumers, I think, would
22 put some value on having that option, knowing

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1 that they could find that. It's just like,
2 you know, being able to look something up in
3 the dictionary, even if you didn't exactly use
4 it that day, there's some value in that.

5 Ultimately, a good estimate of
6 what the consumers would be willing to pay is
7 what they actually are paying. And that would
8 be reflected in the value those sound
9 recordings have the webcasters.

10 JUDGE WISNIEWSKI: Well, certainly
11 as a derived -- I guess what I'm trying to get
12 at here is a little bit more straightforward
13 or simple in a sense. And that is if I have
14 this market for the input, and I know what the
15 price of the input is because I've looked at
16 demand and supply and see where it clears the
17 market. I guess what I'm struggling with is
18 then what is the quantity demanded?

19 THE WITNESS: Well, you know if
20 you want to be very literal, the quantity is
21 one unit of a blanket license.

22 JUDGE WISNIEWSKI: Okay, and

1 that's why I'm asking the question, because I
2 guess wouldn't that determine then the shape
3 of the underlying supply curve?

4 (Pause.)

5 THE WITNESS: It would affect it,
6 yes.

7 JUDGE WISNIEWSKI: What would it
8 generally look like if you define the units
9 that way?

10 THE WITNESS: Well, since these
11 companies have bargaining power, what they're
12 willing to supply is going to be a function of
13 the derived demand and what the marginal
14 revenue is that they could get from increasing
15 the supply or decreasing it. So they would
16 charge some price above marginal cost that
17 would allow them to maximize the revenues.

18 JUDGE WISNIEWSKI: Well, would you
19 say that that supply is elastic or inelastic
20 in terms of its shape?

21 (Pause.)

22 THE WITNESS: I don't know.

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1 JUDGE WISNIEWSKI: You were
2 talking about bargaining power just a minute
3 ago and one of the things that you mentioned
4 in your report is you talked about how you got
5 to your assumptions about the bargaining power
6 number you used throughout your models and the
7 like?

8 THE WITNESS: Yes.

9 JUDGE WISNIEWSKI: One of the
10 things that I'm interested in knowing from you
11 is, is there a limit to how much bargaining
12 you have on one side or the other side of the
13 market in the sense that at some point it no
14 longer becomes a willing buyer/seller market?

15 THE WITNESS: Well, I think the
16 natural bounds in this context would be 100
17 percent bargaining power for the sellers and
18 50 percent bargaining power as a lower bound.
19 I think that you can be very safe in saying
20 that the bargaining power is somewhere between
21 those two extremes. At any point in there,
22 it's still a willing buyer and a willing

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1 seller.

2 JUDGE WISNIEWSKI: So if it's 99
3 percent, do we have a willing buyer and a
4 willing seller market?

5 THE WITNESS: Yes.

6 JUDGE WISNIEWSKI: And remind me
7 again, what was the factor that influenced the
8 50 percent bounds, lower bounds?

9 THE WITNESS: Well, if both
10 parties had equal bargaining power, I think
11 50, then they'd have 50 percent bargaining
12 power. The sellers would have 50 percent
13 bargaining power. Looking at the structure of
14 this market, it's clear to me that the sellers
15 have more bargaining power than the buyer, so
16 I set that as a lower limit.

17 JUDGE WISNIEWSKI: Why not, if
18 you've used 100 percent, which is something
19 that would define a situation where we don't
20 have a willing buyer, willing seller, we've
21 used that as the bounds on one end, why not
22 use zero percent as the bounds on the other

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1 end?

2 THE WITNESS: Well, from a purely
3 theoretical point of view, I think you can do
4 that. But we do know a little bit about this
5 industry, and so I was using that just small
6 amount of knowledge to say that 50 percent
7 would be sort of an extreme lower bound.

8 JUDGE WISNIEWSKI: And the 75
9 percent, would you take us through how you got
10 to the 75 percent number?

11 THE WITNESS: Sure. There's two
12 ways to get that. One is just based on the
13 underlying theory that the sellers clearly
14 have a lot more bargaining power and so 75
15 percent was just sort of a loose broad
16 estimate number, you know, in that range.

17 Specifically, and secondly there's
18 empirical evidence from the sort of related
19 market, not the exact same market, the related
20 market like music downloads or interactive
21 services where the share that the sellers
22 capture appears to be much more, equal to or

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1 more than 75 percent of the surplus.

2 The download market, for instance,
3 looks like they're capturing a lot more than
4 75 percent of the surplus. There's some
5 numbers in the report on that. And the
6 interactive market, again they according to
7 Dr. Pelcovits' statement in the appendix
8 there, I saw that the contacts typically had
9 a number, I don't know if I'm supposed to say,
10 but indicating at least that much bargaining
11 power.

12 So both from understanding sort of
13 the underlying structure of the market and
14 what the agreements actually are and sort of
15 related markets, they both point in the
16 direction that 75 percent is a reasonable,
17 perhaps conservative estimate. But it's worth
18 knowing that, in my model, I broke that out
19 quite separately and you know, you should feel
20 free to see how sensitive it is to putting it
21 in from a 60 percent or 85 percent or whatever
22 number and see how it moves around a little

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1 bit. Use your own judgment.

2 But my best judgment is that it's something
3 north of 75 percent.

4 JUDGE WISNIEWSKI: Okay, a
5 different question. You also talked in your
6 testimony a great deal about advertising costs
7 and the value of advertising and the like?

8 THE WITNESS: Yes.

9 JUDGE WISNIEWSKI: Do you know
10 what the aggregate value of advertising for
11 the internet companies might look like as
12 compared to the aggregate value of advertising
13 for on the air radio? Just roughly.

14 THE WITNESS: It's a small
15 fraction.

16 JUDGE WISNIEWSKI: Small fraction.

17 THE WITNESS: Yes. Current.

18 JUDGE WISNIEWSKI: And just one
19 other computational question, if you can help
20 me with, on page 4 of your amended statement,
21 in Table 1, you're looking at the increase in
22 the economic value of webcasting. I guess

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1 this relates to Live 365?

2 THE WITNESS: Yes.

3 JUDGE WISNIEWSKI: Without talking
4 about the specific numbers here. If you look
5 at the increase in economic value for FY 2005,
6 you have a particular number there.

7 THE WITNESS: Yes.

8 JUDGE WISNIEWSKI: Which shows in
9 absolute terms how much it's increased since
10 2002. Is that the right way you interpret
11 that?

12 THE WITNESS: Yes, that's
13 correct.

JUDGE WISNIEWSKI: What's
14 the percentage increase?

15 THE WITNESS: Well, we sort of
16 started with a base of zero, so I'm not sure
17 you could do a percentage.

18 JUDGE WISNIEWSKI: Was the base
19 zero or was it a negative number?

20 THE WITNESS: Well, we're looking
21 at the difference, compared to what it was
22 then. There's an increase of this amount. At

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1 that time, in 2002, the Live 365 number showed
2 that they were making a loss, yes.

3 JUDGE WISNIEWSKI: Okay, thank
4 you.

5 CHIEF JUDGE SLEDGE: All right,
6 any follow-up questions from Sound Exchange?

7 MR. PERRELLI: No, Your Honor.

8 CHIEF JUDGE SLEDGE: Any follow-up
9 questions from any other party?

10 MR. STEINTHAL: Your Honor, I just
11 have a couple.

12 CHIEF JUDGE SLEDGE: All right.

13 BY MR. STEINTHAL:

14 Q Dr. Brynjolfsson, you said that a
15 good indication of value is what consumers
16 pay, right?

17 A Yes. Consumers and advertisers,
18 yes.

19 Q Right and in your model 2, you
20 looked at for the subscription part of the
21 business what consumers pay, right?

22 A Yes, I do.

1 Q And for the nonsubscription part
2 of the business which I think you said was
3 roughly 90 percent of the business as it is
4 today, right?

5 A Ours, yes.

6 Q Yeah.

7 A Eighty percent of revenues.

8 Q And you looked at -- when you
9 looked at what the value is for that part of
10 the business, you did your estimates of
11 advertising revenues for the various services,
12 right?

13 A Yes, that's correct.

14 Q And I gather that you did that
15 because you felt that you needed to actually
16 put a figure on the nonsubscription part of
17 the business which is supported by
18 advertising, right?

19 A Yes.

20 Q That you wouldn't be comfortable
21 taking just the numbers from the subscription
22 services as a barometer for what the revenues

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1 would be for the rest of the industry, right?

2 A Well, they're a barometer.
3 They're an indication, but we have additional
4 information so we thought we would apply as
5 much information as possible.

6 Q And you'd want to use the
7 information that you could get to look at what
8 is 80 to 90 percent of the market, rather than
9 rely on the information from the subscription
10 market, right?

11 A I would like to rely on as much
12 information as possible from all the available
13 sources.

14 Q I have no other questions.

15 MR. JOSEPH: Nothing from me, Your
16 Honor.

17 CHIEF JUDGE SLEDGE: That
18 completes all of the testimony of Dr.
19 Brynjolfsson. We will not start another
20 witness before breaking for mid-day. We'll
21 recess until 2 o'clock.

22 (Whereupon, at 12:11 p.m., the hearing

1 was recessed, to reconvene at 2:00 p.m.)

2 CHIEF JUDGE SLEDGE: Thank you.

3 We'll come to order. Mr. Handzo.

4 MR. HANDZO: Thank you, Your
5 Honor. Sound Exchange will call as its next
6 and final witness before spring break, Mr.
7 Bruce Iglauer.

8 CHIEF JUDGE SLEDGE: Mr. Iglauer,
9 would you raise your right hand, please.

10 WHEREUPON,

11 BRUCE IGLAUER

12 was called as a witness and, after having been
13 first duly sworn, was examined and testified
14 as follows:

15 CHIEF JUDGE SLEDGE: Thank you.
16 Be seated.

17 MR. HANDZO: For the record, would
18 you tell us your name.

19 THE WITNESS: My name is Bruce
20 Iglauer.

21 DIRECT EXAMINATION

22 BY MR. HANDZO:

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1 Q Mr. Iglauer, where are you
2 currently employed?

3 A I'm the President of Alligator
4 Records in Chicago.

5 Q What is Alligator Records?

6 A Alligator Records is an
7 independent record label specializing in
8 recording blues and blues-based musicians. We
9 have a catalogue of about 240 in-print CDs.

10 Q What's your position with
11 Alligator Records?

12 A I'm the President, and also the
13 founder.

14 Q Let me ask you this, when did you
15 found Alligator Records?

16 A The spring of 1971.

17 Q Can you tell us how Alligator
18 Records got started?

19 A I came to Chicago because I'm a
20 blues fan, and Chicago is the biggest blues
21 center in the world. And I went to work for
22 a small record company called Delmark Records

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1 where I was a shipping clerk, and a sort of
2 general whipping boy. I spent every night in
3 blues clubs in the black community in the
4 south and west side in the ghetto hearing
5 various bands, and being in love with this
6 kind of music. And I heard a band called
7 Hound Dog Taylor and the House Rockers. This
8 was the band -- they were the happiest band I
9 ever heard. I wanted to get them recorded. I
10 wanted to produce them.

11 I went back to my boss at Delmark
12 Records and said, "You've got to listen to
13 this band. You've got to sign them. You've
14 got to have me produce them. They're going to
15 be great." I couldn't talk him into it. And
16 in frustration, wanting to prove to my mentor,
17 the fellow who ran this label, that he should
18 have recorded this band, and he should have
19 let me produce them, I started my own record
20 label to record my favorite band.

21 Q And this was what year?

22 A 1971.

1 Q And how did that sound recording
2 do?

3 A Relative to the blues world, it
4 was quite a success. I think we sold 9,000
5 copies the first year.

6 Q Now when you started Alligator
7 Records back in the early 70s, how many
8 employees did you have?

9 A I would be the staff, the entire
10 staff.

11 Q Where were your offices located?

12 A I had an efficiency apartment in
13 uptown in Chicago, one room, and that was the
14 office, as well as my home. I had a shipping
15 table made from a piece of plywood and some
16 sawhorses, I slept on a mattress on the floor.
17 I had a walk-in closet which was my warehouse.

18 Q How long was it before you hired
19 your first employee?

20 A I hired a part-timer four years
21 later. Before that, it was me all the time.

22 Q And did there come a time when you

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1 moved out of the apartment?

2 A Well, I moved actually to a
3 slightly larger apartment in the same
4 building, but finally about 1974 or '75 I
5 rented a small house on the north side of
6 Chicago, and I moved myself and my company
7 into my house.

8 Q How long was it that you operated
9 out of your house?

10 A About 11 years, and by that time I
11 had seven people coming to my house every day
12 to go to work, and a xerox machine in the
13 dining room. I was actually running my office
14 in my bedroom because there was no other space
15 available. The artists would come to have a
16 meeting with me and sit on my bed to talk. So
17 finally in frustration, I found a small
18 building in the neighborhood and moved there.

19 Q Let's sort of fast forward a bit.
20 How many employees do you have now?

21 A Including myself, I have 16.

22 Q And I take it you're no longer

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1 working out of your house.

2 A I still have an office in my
3 house, but I work there by myself.

4 Q You mentioned, I think, that
5 Alligator Records primarily focuses on blues.
6 Is there any other kind of music that
7 Alligator Records produces?

8 A Over the years we've done some
9 things that have been related to blues.
10 Briefly, we had a series of reggae releases in
11 the early 80s. We recorded some what's
12 generally called roots rock and roll, a few
13 things that might fall in an area called
14 Americana. This is all music that is
15 structurally fairly simple music. It all has
16 some roots in blues.

17 Q Have any of the albums that you
18 created through Alligator Records won any
19 awards?

20 A Yes, quite a lot, actually. Two
21 Grammy awards to start with, and about I'm
22 thinking 35-40 Grammy nominations. We've also

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1 won awards like the Grand Prix of the Hot Club
2 of France, and the Grand Prix of the Montreal
3 Jazz Festival. We've won Indie Awards from
4 the Association for Independent Music, and
5 we've won what are now called the Blues Music
6 Awards. In fact, we've won more of those than
7 any other label.

8 Q Can you tell us some of the
9 artists that you worked with at Alligator
10 Records?

11 A I mentioned Hound Dog Taylor, Sun
12 Seals, Albert Collins, Johnny Winter who some
13 people might have heard of here, Roy Buchanon,
14 recently somebody mentioned a new artist of
15 our's, Eric Lindell, Blue Light of the Blues
16 Imperials, 240 albums so quite a lot of
17 artists. Some of those are anthologies of
18 various artists that we've worked with.

19 Q Now, Mr. Iglauer, is Alligator
20 Records affiliated with any of the major
21 record companies?

22 A No.

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1 Q So it is what we call an indie?

2 A Absolutely, and proud of it.

3 Q Tell us from your perspective what
4 the difference is between an indie and one of
5 the majors.

6 A In a sense, there are two
7 differences. By the business standards of the
8 record industry, the difference has to do with
9 distribution. The majors own companies which
10 are distributing companies. Those companies
11 sell to retailers, so the majors control two
12 steps of the distribution process. The
13 independents sell to independently owned
14 distributors, which then sell to the
15 retailers, so the major labels have two income
16 streams, wholesale and manufacturing. We have
17 one income stream which is the manufacturing
18 income stream.

19 From a more personal and sort of
20 traditional point of view, the indies have
21 tended to be privately held companies. They
22 have tended to be companies owned by people

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1 who are music driven as versus just money
2 driven people. They have been companies that
3 have, in a sense, found their own artistic
4 way. To try to make it clear about Alligator,
5 I didn't get into the record business thinking
6 how could I sell as many possible units of
7 whatever kind of music the public will swallow
8 as I can to make money. I thought how can I
9 take this music that I truly love and get it
10 to as many people as possible, and make a
11 living doing it so I can make more of these
12 records.

13 Q You mentioned -- let me back up.
14 How many new releases do you currently have
15 now in the last year or two?

16 A We've been typically doing six or
17 eight a year. Sometimes those include
18 repackages of previously released material,
19 like Best Of-type packages.

20 Q And how many units does each of
21 your new releases typically sell?

22 A Well, it varies a lot. A big hit

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1 for us would be 50-60,000 sales in the United
2 States. A big disappointment might be 3,000
3 sales in the United States. And more often,
4 sales are somewhere in the 5-15,000 area. It
5 varies a great deal from artist to artist.

6 Q And with respect to those sales,
7 do those normally come pretty much during the
8 first year, or are you seeing sort of a long
9 tail effect there?

10 A The bulk of our sales tend to come
11 when the records are new. In the old days,
12 say from five years ago back, our back
13 catalogue, our older titles, some of which are
14 classics in the field, generated quite a lot
15 of sales, but with the climate in the industry
16 as it is now and with the retailers being so
17 scared, a lot of those records are simply not
18 in stores any more, so we used to depend a
19 great deal on our back catalogue to support
20 the label, and now it's rather the opposite.

21 Q I want to ask you a little bit
22 about the cost of making these sound

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1 recordings or CDs. First of all, let's start
2 with how you go about locating talent or new
3 artists.

4 A Well, generally speaking, I'm the
5 talent scout for the label. I spend a lot of
6 time going to live performances, hanging out
7 in blues clubs, following leads, traveling
8 around the country to see people that I'm told
9 are good, or if somebody sends an interesting
10 sounding demo recording to me, I may get on a
11 plane and go see them.

12 Once I decide that I'm interested
13 in an artist; and, of course, I have to
14 negotiate a deal with the artist, and then I
15 pay for everything.

16 Q Let me stop you there for a
17 second. I mean, I assume you have costs
18 involved with the traveling around and finding
19 them.

20 A Oh, absolutely. And, of course,
21 many times these costs don't turn into
22 anything. I'll go see somebody and not be

1 excited, or I'll attempt to make a deal and
2 fail to do so.

3 Q But if you find somebody you
4 really like and you enter into a deal with
5 them, does that sometimes involve advances
6 paid to the artist?

7 A Oh, absolutely. I don't ask
8 artists to record for me without being paid.
9 The advances will vary based on what I see is
10 the commercial potential of the artist.

11 Q And then when you get to the point
12 of actually making a sound recording, can you
13 tell us what costs you wind up incurring with
14 that?

15 A Well, besides paying the artist,
16 and if the artists don't have their own groups
17 - if the artists have their own groups, I may
18 be paying the whole group - often I'll be
19 paying hired accompanists, I'll be paying the
20 recording studio, I'll be paying the engineer,
21 I'll be then paying for the mixing after we've
22 done the recording. And, of course, I may be

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1 flying people in or housing them, feeding
2 them, renting equipment. Then the packaging,
3 the photos, the design of the packaging, the
4 mastering of the record which is what takes it
5 from its raw form into a form that can be
6 reproduced physically. And then all of the
7 physical production of the disk, including
8 thousands of promotional copies.

9 Q Once the album or CD has actually
10 been manufactured and in its jewel box and so
11 on, how do you get it distributed?

12 A We sell now - we used to sell to a
13 lot of different distributors in the United
14 States. Now we sell to one distributor in the
15 United States who is responsible for getting
16 out there and convincing the stores they
17 should buy the CD, because right now there are
18 over 60,000 new CDs released a year in the
19 United States. Most of them never see their
20 way to the inside of a store.

21 We provide incentives for the
22 stores by previous to selling a single copy,

1 saying we're prepared to spend X amount of
2 money for retail promotion programs. Those
3 can include listening stations with
4 headphones, they can include displays, they
5 can include being on the top shelf or in the
6 front rack, or what's called an end pack which
7 is a special display unit. We also sometimes
8 will guarantee advertising where we tag the
9 name of the store in the advertising. All of
10 this to provide an incentive for the stores to
11 bring the music in.

12 Q So those are monies that you pay
13 to the retailer?

14 A Those are monies which are
15 actually credited to the retailer, who charges
16 back the -- deducts them from what they pay
17 the distributor, then the distributor deducts
18 them from what they pay us. And, again, I
19 want to emphasize, we make these commitments
20 primarily before release, so in addition to
21 all of the expenses we have to make and
22 manufacture the record, we're guaranteeing

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1 this money before we know if we're going to
2 sell a single unit.

3 Q Do you have any costs associated
4 with marketing of the album or the CD?

5 A Well, beyond paying for these
6 retail programs, we manufacture and send out,
7 and follow-up on thousands of promotional
8 copies to press, to radio, to retail for in-
9 store play, to our distributor/sales people
10 who distribute them by hand to various
11 retailers, to potential places where the
12 artist might perform, clubs and concert
13 promoters, as well as to a number of what we
14 call industry tastemakers who we hope are kind
15 of in the grapevine, and will create a buzz
16 for the artists.

17 Q Do you spend money on advertising?

18 A Absolutely. On our more
19 specialized blues records which we're seeing
20 primarily for the hardcore blues audience,
21 we'll advertise in the key American Blues
22 magazines, of which there are two, and then

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1 there are a number of blues societies around
2 the country which have small publications, and
3 we advertise in essentially all of those.

4 In addition, we may buy, depending
5 on the artist we may buy space in magazines
6 like *Paste*, *No Depression*, in one case we
7 bought an ad recently in a magazine called
8 *Rockabilly*, and we may buy advertising -- we
9 often buy advertising to help make gigs a
10 success, local performances, so we'll buy
11 advertising in the equivalent of say the
12 *Washington City Paper*, or the *Village Voice*,
13 to pick weekly publications that might be
14 familiar to people here.

15 Q When your artist plays a gig, does
16 that help sell the CDs?

17 A Absolutely. Part of the
18 philosophy of Alligator is that a great live
19 performance is the best sales tool we've got.
20 If we can get people in the door, I pick
21 artists who are exciting live, who can move an
22 audience live. If we get people in the door,

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1 we believe they'll want to buy the music. And
2 these days, because the stores are so
3 difficult, we also make sure that the artists
4 we sign are prepared to make sales off the
5 bandstand, and actually complete the
6 transaction, so somebody gets in the door,
7 they leave with that CD, and we make money,
8 and the artist makes money.

9 Q And so do you financially support
10 them when your artists play gigs?

11 A If you mean pure tour support,
12 where we actually say gee, you're not making
13 enough money to play here, and it's a good
14 exposure gig for you, we'll help you out, we
15 do that occasionally. We don't do it very
16 often. Frankly, we can't afford to. In terms
17 of supporting the gig by creating a lot of
18 media interest, yes, absolutely. And we
19 continue to do that for months and months
20 after a new release.

21 Q Now in addition to the costs that
22 you've described, you also have royalty costs

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1 to pay?

2 A Oh, sure. We pay mechanical
3 royalties to the publishers of the songs who
4 then pay the writers. For every CD sold from
5 CD number one, we pay artist royalties based
6 on sales, based in our case on a percentage of
7 the suggested retail price, but there are
8 certain costs that are recoupable out of those
9 artist royalties before the artist sees
10 additional money.

11 Q Let me ask you about the
12 recoupment. You've described a number of
13 costs that you have in creating the sound
14 recordings and the CDs. Are there some of
15 those costs that you try and recoup from the
16 artist?

17 A Yes.

18 Q Which ones?

19 A Advances to the artists, the cost
20 of actually making the recording; that is, the
21 studio, the engineer, hired accompanists we
22 call side men, hired side men if we need them,

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1 the cost of mixing, the cost of mastering, did
2 I say the advance that we give to the artist
3 first and foremost? Sometimes the artists
4 will agree that the costs, additional costs
5 are recoupable. Some artists are eager enough
6 to be on the label, they may come to us and
7 say we'll help by making 20 percent of your
8 advertising recoupable, for example, but
9 that's pretty rare.

10 Q Now just so I understand, you're
11 recouping some of those costs out of the
12 revenues that would otherwise be paid to the
13 artist as a royalty?

14 A Yes.

15 Q Okay.

16 A Typically, the artist is making a
17 percentage of the suggested list price,
18 suggested list price in this country is
19 usually \$16.98, so they'll be making a
20 percentage of that, but those costs will be
21 considered their monies paid in their behalf
22 in advance.

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1 Q Okay. Now what happens if the CD
2 doesn't sell enough to recoup your costs?

3 A We eat it.

4 Q Does that happen?

5 A Oh, yes, quite a lot. I should
6 explain that even though advances are called
7 advances in the music industry, the artists
8 are not expected to pay them back. If the
9 record doesn't sell, the artist keeps the
10 money. So, essentially, it's a one-way
11 payment. If we never sell a single copy, the
12 artist keeps the money.

13 Q So if you don't sell much of a CD,
14 who's at risk for those costs?

15 A Oh, I am completely.

16 Q Are there costs that don't get
17 recouped in any event?

18 A Oh, many. All of the costs of
19 manufacturing, all of the costs - I mentioned
20 those thousands of promotional copies we send
21 out, making them, shipping them, following up
22 on them, posters, photos, bios, the press kits

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1 that we put together, all of these things are
2 non-recoupable. The advertising is non-
3 recoupable. The store programs that I
4 mentioned are non-recoupable. This is all
5 falling on us.

6 Q Now just to complete the cost side
7 of the picture, are there overhead costs, as
8 well?

9 A Oh, absolutely. What I figure
10 break-evens, for example, I don't figure or
11 the cost of my 16 staff members. I don't
12 figure for my phones, for my emails, for my
13 rent, for the almost \$100,000 in health
14 insurance that I pay for my employees. Now
15 these are my costs, and these are day-to-day
16 costs that we simply absorb in the overall
17 income of the company.

18 Q Now you mentioned before some
19 costs that you have in connection with trying
20 to market or sell CDs.

21 A Yes.

22 Q In connection with how you market

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1 or promote your CDs, is getting radio play
2 part of that?

3 A Oh, yes. Primarily still
4 terrestrial radio play, old school radio.

5 Q When you try and get that
6 terrestrial radio play, does it matter to you
7 what it is that the radio station plays?

8 A Absolutely. Whenever we have a
9 new release, we focus on one song. We may
10 make a physical single, a CD single for radio
11 only to help the radio programmers concentrate
12 on that one song, because just as with
13 advertising, it's repeated impressions that
14 cause people to remember a piece of music, and
15 then hopefully buy it. So we will -- somebody
16 here mentioned a new artist of our's, Eric
17 Lindell. There's a song from his album, the
18 song is called *Give It Time*. If the radio
19 single were working, we're also making it
20 available on our website as a free download
21 for people. In all of the advertising we do -
22 - I didn't mention advertising in radio trade

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1 publications. We do that, as well. It's Eric
2 Lindell featuring the single *Give It Time*.
3 When we put out a single like that, or when we
4 work a new album, we ask the radio stations -
5 we tell the radio stations what the date is
6 that we want to have it added to their
7 playlists, the add date. And we want that
8 date to be the same for every station, so the
9 week it comes out we can show up on the charts
10 that the radio stations look at. If the radio
11 station chooses another song, it doesn't show
12 up on that chart, even though they may be
13 playing it.

14 The radio business is full of
15 sheep, and radio programmers look at what
16 other radio stations are playing, so if we get
17 an ad on KFOG in San Francisco for Eric
18 Lindell, which we just did, it's a hugely
19 important station in the field of radio, the
20 genre of radio that we reach out to. Seeing
21 that KFOG added this song is sort of a seal of
22 approval in the format which is called AAA,

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1 Adult Album Alternative radio, and we have a
2 good chance of getting that song added. If
3 KFOG added a different song, it wouldn't help
4 us nearly as much.

5 Q So does random play of random
6 songs help you?

7 A It's hard to know. It's better
8 for people to artists some than not at all, if
9 they're paying attention, if they remember the
10 artist, if they remember the song.

11 I have a friend who does radio
12 promotion for another label, blues promotion,
13 and he suggested to all of us in the blues
14 business that instead of releasing the full CD
15 through radio, that we only do a radio single,
16 because it's intensely frustrating for us to
17 see a blues specialty program playing dabbling
18 of the record, playing one track one week, and
19 a different track the next week, and a
20 different track the next week because it will
21 never make that impression on the listener of
22 that song, that artist.

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1 Let me give you a great example.
2 The best known blues artist in the world is
3 B.B. King. The reason he's the best known
4 blues artist in the world, besides that he's
5 immensely talented, is that in I think 1969,
6 ABC Records released a single of a song called
7 *The Thrill Is Gone*, and it got onto commercial
8 radio, and was played constantly. The rest of
9 the album wasn't played. That song was
10 played. It became his best known song, his
11 signature song, he closes every night with it,
12 and it moved him from being a middle level
13 artist to a top level artist.

14 Q Now in terms of getting radio
15 play, do you try and get play on webcast
16 stations?

17 A I think I'm correct in saying that
18 we don't service any pure webcasters with free
19 CDs. Some of the commercial stations and
20 public stations that we service, terrestrial
21 stations we service simulcast on the web. We
22 don't reach out to webcasters.

1 Q Why is that?

2 A First of all, we don't know if
3 they're having any effect on sales. Second,
4 we don't know if they are having an effect,
5 who is having the effect. There are hundreds
6 and hundreds of webcasters webcasting our
7 genres of music. Which ones are important and
8 not important, we simply can't determine.

9 Q Now you mentioned that there are
10 webcasters who have niche stations that focus
11 on the blues. Is that --

12 A Well, there definitely are
13 webcasters that have niche stations.

14 Q And to the extent that there are
15 niche webcast stations that focus on the
16 blues, have you given any thought to whether
17 that helps or hurts your sales?

18 A Well, I've given thought to it,
19 but unfortunately I have no way to research
20 it. There's simply nothing, there's nothing
21 published, there's no technical means that I
22 know of to equate play to sales. Now when we

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1 get played on terrestrial radio, to give you
2 a great example, a real station in Santa Rosa,
3 California, KRSH is playing that same Eric
4 Lindell song. And that area of Sonoma County
5 right now is the number one market for that
6 album in the country. People are hearing the
7 one song and they're going out and buying the
8 record.

9 Q Do you have any concern that niche
10 webcast stations that specialize in the blues
11 could substitute for the purchase of your CDs?

12 A I can tell you this; I know many
13 people who sit and listen all day long to
14 webcasts. They're generally at work at their
15 computers. One of the key people on my staff
16 does that. She listens to the webcast of
17 WWOZ, the simulcast of WWOZ in New Orleans.
18 She's not playing any of her own CDs, any of
19 my CDs, she's listening to streamed music. I
20 also know that, to pick the example of
21 satellite radio, if it's okay to go there for
22 a second, if you could -- I know we're not

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1 talking about satellite radio here, but the
2 parallel I believe is there. If you could
3 drive across the country listening to
4 Bluesville on XM radio 24/7 listening to the
5 kind of music I love, why do you put 25 CDs in
6 your car? Why do you buy those 25 CDs to
7 listen to, if what you're hearing by webcast,
8 or simulcast, or a satellite radio station is
9 fulfilling your need for the music.

10 Q Now we've talked some about your
11 costs. What's the major source of your
12 revenue?

13 A Our major revenue source is still
14 sales of physical CDs, by far.

15 Q And overall, how do Alligator
16 sales of CDs today compare to five years ago?

17 A I've looked at some numbers for
18 five and six years ago, and our sales are down
19 roughly 30 percent. Obviously, some artists
20 have dropped more than others, some titles
21 have dropped more than others, but our overall
22 flow of cash between 1999 and now has dropped

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1 that much. In fact, this year we're down 14
2 percent from last year.

3 Q What impact do those decreased CD
4 sales have on your business?

5 A Well, in 1999, if I'm picking the
6 correct year, we had 23 people on the staff,
7 now we have 16. At one point, we released as
8 many as 14 CDs a year, now we're releasing
9 seven or eight. A number of artists who were
10 marginally selling artists, artists who were
11 perhaps more traditional blues artists,
12 artists for the hard core market only, what we
13 generally thought of as sort of our B
14 releases, releases we put out because we
15 believe in the artist, we believe in the
16 music, but we knew the commercial prospects
17 were relatively low. Those B releases we
18 could no longer release because we can't get
19 enough of them into the stores and sell enough
20 of them to just break even.

21 Q Now as CD sales fall, are you
22 looking to other ways to offset the loss of

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1 revenue?

2 A Oh, absolutely, I have to. I want
3 to stay in business.

4 Q What are you looking to?

5 A Well, there are three major areas
6 where we're looking. We're working much more
7 aggressively on film, television, and
8 advertising placements of our songs, either
9 our masters or the songs themselves if we
10 publish the music, if they can be recorded by
11 other people. We're dealing with a number of
12 legitimate downloaders in this country and
13 elsewhere in the world, and that's one of our
14 few growing sources of revenue. And one of
15 the nice bonuses is the money we get from
16 Sound Exchange.

17 Q And have you been getting money
18 from Sound Exchange?

19 A Absolutely, yes, and it's manna
20 from heaven.

21 Q Do you know whether those Sound
22 Exchange royalties matter to your artists?

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1 A To give you an example, I have a
2 band on the label called Roomful of Blues, and
3 by my standards it's a fairly large band, it's
4 an eight-piece band, and they travel around
5 the country in a very old bus, probably
6 literally 40 years old. Recently, their bus
7 again broke down, as it does so often. And as
8 it broke down, Roomful of Blues received a
9 check for a little over \$2,000 from Sound
10 Exchange, and it fixed their bus. They told
11 me that was made the difference, that's what
12 got them to the gig.

13 I know that the artists have just
14 welcomed this money so much, they've been so
15 pleased, they have called me about it. In a
16 number of cases, I've gotten the artists into
17 Sound Exchange. Many of my artists
18 unfortunately have real limited formal
19 education. Some of them aren't on line at
20 all, some of them -- Koko Taylor has been with
21 me for 30 years, graduated sixth grade from a
22 black high school in Tennessee in the 1930s.

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1 She has trouble reading and writing. She's
2 not dumb, she just -- that was her education,
3 so she needed me to put her in Sound Exchange,
4 but she's been very happy with the checks.

5 MR. HANDZO: Can I just have a
6 moment? Thank you, Your Honors, that's all I
7 have.

8 CHIEF JUDGE SLEDGE: Cross by
9 DiMA.

10 MR. LARSON: Thank you, Your
11 Honor. Tom Larson for the Digital Media
12 Association. Mr. Iglauer, how are you today?

13 THE WITNESS: Fine, thanks.

14 MR. LARSON: Thank you for coming
15 all the way from Chicago for this. I'm going
16 to start with an exhibit, if that's okay.
17 And, Your Honor, at this point, the couple of
18 exhibits I'm going to start with contain
19 restricted material, including financial
20 statements from Mr. Iglauer's company, so I
21 would move to invoke the protective order.

22 MR. HANDZO: If I may just see the

1 exhibits, we may or may not need to do that.
2 Actually, this is one I think where we would
3 invoke the protective order. It's a fairly
4 detailed statement of profit, and loss and
5 expense.

6 CHIEF JUDGE SLEDGE: What is the
7 motion?

8 MR. HANDZO: Your Honor, I would
9 move to invoke the provisions of the
10 protective order with respect to this exhibit,
11 which contains a detailed statement of
12 financial information with respect to Mr.
13 Iglauer's business.

14 MR. LARSON: Mr. Iglauer, do you
15 recognize this?

16 CHIEF JUDGE SLEDGE: Mr. Larson,
17 you are --

18 MR. LARSON: I'm sorry, sir.

19 (Whereupon, Exhibit
20 Services 105 was marked
21 for identification.)

22 CHIEF JUDGE SLEDGE: Any objection

1 to the motion to apply the protective order to
2 questions relating to Service Exhibit 105
3 consisting of detailed financial information
4 of the witness? Without objection, motion is
5 granted.

6 (Whereupon, the proceedings went into
7 Closed Session.)
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1 MR. LARSON: I'd like to hand out
2 what's been marked as Exhibit 107, Services
3 Exhibit 107.

4 (Whereupon, Services's
5 Exhibit 107 was marked
6 for identification.)

7 BY MR. LARSON:

8 Q Mr. Iglauer, do you recognize this
9 article?

10 A It was printed in *Billboard*, I
11 see. And assuming that it's the one that I
12 remember, it looks familiar. I remember
13 especially the numbers toward the end on page
14 2, which I had pointed out to my legal
15 counsel.

16 Q In fact, this is an article that
17 you submitted as an exhibit to your witness
18 statement. Is that right?

19 A This was an article submitted with
20 the witness statement, yes.

21 Q Okay. Could you turn to page 2,
22 please?

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1 A Yes.

2 Q You see the third paragraph says,
3 "But others say hits are what retailers need,
4 and so far this year the release schedule
5 hasn't been as strong a factor, Tower Records
6 V.P. Kevin Cassidy says."

7 A Yes.

8 Q It's possible, is it not, that a
9 decrease in sales for a company in a given
10 year could be caused by a weak release
11 schedule for that company. Is it not?

12 A Yes.

13 Q Okay. And that could be
14 especially important for a company like
15 yourself, where you only have six or eight
16 releases that you put out in a given year, as
17 you said.

18 A True, but I'd like to point out
19 that from the end of 90s until now, the gross
20 income of my company has gone from around \$4
21 million a year to about \$2.3 million a year.

22 Q We heard your testimony before.

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1 I'm just asking --

2 A Okay. Well, I didn't testify to
3 those numbers.

4 Q Yes. Now if you could look two
5 more lines down, or two more paragraphs,
6 excuse me, it says, "Some look at even bigger
7 picture. You have to factor in that all
8 retailing has been soft since gas went north
9 of \$2, Hastings Entertainment Chairman and
10 CEO, John Marmaduke says. Any time a consumer
11 is hit with a large increase in a fundamental,
12 they tend to cut back on non-essentials.
13 That's the psychology of the consumer and
14 video rental, the box office, DVD, and book
15 sales are all feeling it now." So it's
16 possible, is it not, reading that, Mr.
17 Iglauer, that a decrease in sales in a given
18 year could also be caused by things like poor
19 economy, increasing gas prices, things like
20 that?

21 A Oh, absolutely that's true.
22 Again, we're talking about a pattern over a

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1 number of years. We're not talking about an
2 individual year here.

3 Q Right. As we saw, though, within
4 that pattern, there were years where your
5 sales increased, as well as years where they
6 decreased. Correct?

7 A Well, if you call the difference
8 between a \$25,000 profit and a \$40,000 profit
9 a significant increase, yes.

10 Q In fact, in 2001, if I read your
11 income statement correctly --

12 MR. LARSON: Your Honor, I'm
13 sorry, I was about to ask a question with a
14 number in it that would be restricted
15 information again, a financial figure. And I
16 guess I would move to invoke the protective
17 order. Mr. Handzo.

18 MR. HANDZO: Yes, that is
19 restricted information with respect to the
20 particular profit and loss of the business,
21 and we would ask that that be treated as
22 restricted.

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1 CHIEF JUDGE SLEDGE: What is the
2 question you're going to ask?

3 MR. LARSON: The question is about
4 sales figures for 2001, revenue.

5 CHIEF JUDGE SLEDGE: In what year?

6 MR. LARSON: 2001, sir.

7 CHIEF JUDGE SLEDGE: Mr. Handzo,
8 justify that motion.

9 MR. HANDZO: May I just have one
10 moment, Your Honor?

11 CHIEF JUDGE SLEDGE: Yes.

12 MR. HANDZO: Your Honor, I know
13 this is a little unusual, but actually I'd
14 like to ask the witness, given it's from 2001,
15 whether those are figures that he would still
16 consider confidential or not.

17 CHIEF JUDGE SLEDGE: That's fine.
18 Please proceed with voir dire.

19 THE WITNESS: If we were
20 considering that figures for other years are
21 confidential, I actually prefer if they were.
22 I'd also like to look at the document, because

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1 I don't have those in my head. I'm sorry.
2 Can I ask if that's a problem? I'm not
3 understanding.

4 CHIEF JUDGE SLEDGE: It's a
5 problem because the request is to seal public
6 proceeding from the public, and that's a
7 problem, and so we're trying to determine if
8 sufficient cause exists to seal public
9 proceedings from the public.

10 MR. HANDZO: And if I can just
11 sort of inquire a little bit more. Mr.
12 Iglauer, I guess there are two questions. One
13 is, does it sort of matter that it's 2001
14 versus present to you in terms of whether it's
15 confidential or not? And two, are these the
16 kinds of figures that you would regard as
17 competitively sensitive for your business?

18 THE WITNESS: I guess the answer
19 to both of those is mildly so. I don't
20 consider this a big issue, and I don't want to
21 hang up the court's time on this, so I guess
22 I would go ahead - I'll agree to go ahead and

1 talk about those if you want.

2 MR. LARSON: I could ask the
3 question, and if you feel that the figure
4 that's included in my question is something
5 you're uncomfortable with, then we could mark
6 it --

7 THE WITNESS: Fine. I'm concerned
8 because I'd probably want to look at the
9 document.

10 MR. LARSON: Okay. So let me just
11 ask you this. When I looked at your --

12 CHIEF JUDGE SLEDGE: The motion is
13 withdrawn?

14 MR. HANDZO: At this time, yes,
15 Your Honor.

16 CHIEF JUDGE SLEDGE: Okay.

17 MR. LARSON: When I looked at your
18 income statement from 2001, this is very
19 similar to that, it indicated that your sales
20 increased in 2001 by about \$465,000.

21 THE WITNESS: I can explain that
22 if you'd like.

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1 MR. LARSON: Okay.

2 THE WITNESS: In 2000, we went
3 from being a company distributed by multiple
4 independent distributors in various cities, to
5 being a company distributed by one
6 distributor, so what happened in 2000 was we
7 announced to all of these distributors you're
8 no longer representing us, and you can return
9 whatever is in your warehouse, which we will
10 issue you credit for, or if necessary, buy-
11 back with cash if we end up owing you money,
12 rather than you owing us money. We'll buy
13 them back. So that year we took a huge amount
14 of returns. It was a very unusual year for
15 us.

16 Our present distribution situation
17 -- then a lot of that product was shipped to
18 our new distributor. Our new distributor
19 operates on consignment; that is, the sales
20 are not made until the stores actually order
21 and are shipped, the CDs. Then the sale can
22 be, in a sense, unmade if they return the CDs.

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1 It becomes a negative sale, so we took these
2 huge returns in 2000, which made 2000 a very
3 odd year for us.

4 BY MR. LARSON:

5 Q So 2000 was actually lower, and it
6 made the increase in 2001 appear to be larger.
7 Is that what you're saying?

8 A Right. Yes. Essentially, the
9 unmade transactions in 2000 that we remade in
10 2001. I hope that's clear.

11 MR. LARSON: I guess we weren't
12 under the protective order on that?

13 THE WITNESS: No, and I'm fine
14 with that.

15 MR. LARSON: Okay. I'd like to
16 pass out what I've marked as Service's Exhibit
17 108.

18 (Whereupon, Service's
19 Exhibit 108 was marked
20 for identification.)

21 BY MR. LARSON:

22 Q This is a printout from the

1 website of something called *Mix Magazine*. Do
2 you happen to recognize this, Mr. Iglauer?

3 A Well, I'm certainly familiar with
4 *Mix Magazine*.

5 Q Take a look at page 1, and you'll
6 want to flip over to page 2, where you'll see
7 your name appears at the top.

8 A I see my name.

9 Q Does that refresh your
10 recollection as to what this document is?

11 A Honest answer is I'd have to look
12 this over.

13 Q Okay. Take a moment, if you need
14 to.

15 A Okay. Is there a particular -
16 since this is long, is there a particular
17 section you'd like to point me to?

18 Q Just the first page, the first
19 paragraph, in fact. Does this appear to be a
20 letter that you --

21 CHIEF JUDGE SLEDGE: Just a
22 moment. Just give him time to look over it.

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1 THE WITNESS: Oh, I see, starting
2 after the -- oh, I see. Okay. Now I'm
3 understanding what I'm supposed to look at.
4 Excuse me. I'm sorry. I was just confused.

5 MR. LARSON: That's okay.

6 CHIEF JUDGE SLEDGE: I want to
7 look at something before I answer questions
8 about it.

9 BY MR. LARSON:

10 Q Mr. Iglauer, does this appear to
11 be a letter that you sent to *Mix Magazine*?

12 A It certainly appears to be. To be
13 honest, I don't recall writing it, but I would
14 say that in May of 2003, that I would have
15 stood behind these opinions, so I'm
16 comfortable in assuming that I did write it.

17 Q Let me just ask you about the
18 first paragraph. You write, "This is the most
19 radical change I've seen in the music industry
20 in the 33 years I've been in it. Music is
21 losing its prominence as a form of leisure
22 time activity, competing with DVD, video

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1 games, 100 channels of cable, et cetera, plus
2 rampant copying and downloading." It's
3 possible, sir, is it not, that a decrease in
4 sales for a company over a period of time or
5 in a given year, could in part be caused by
6 the fact that people are buying things like
7 DVDs or video games instead of CDs. Is that
8 fair?

9 A Yes.

10 Q Okay. You talked about the cost
11 of creating CDs before, including
12 manufacturing and distribution costs.

13 A Yes.

14 Q Those don't exist with digital
15 downloads. Is that correct?

16 A The physical manufacturing does
17 not exist. We still have to create and record
18 the music, of course, so all those other costs
19 continue to exist. The other thing I should
20 say is, we also have to create a marketplace
21 for it. Just because something is available
22 as a download doesn't mean that anybody

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1 necessarily wants to buy it, so we have to do
2 everything we can to create public awareness
3 and public demand.

4 Q Understood. And those costs don't
5 exist also with webcasting or with the
6 subscription services that you spoke about.
7 Correct? The manufacturing and distribution
8 costs.

9 A Right. They're digital files.

10 Q You also talked with Mr. Handzo
11 about the advances that had. Do you recall
12 that?

13 A Yes.

14 Q If I could ask, what is the
15 royalty rate that you generally pay to your
16 artists?

17 A Frankly, I'm uncomfortable giving
18 that information as public information. I'll
19 give you --

20 MR. LARSON: Before you answer
21 then, let's --

22 THE WITNESS: I'll give you a sort

1 of general picture, if you want, but I --

2 MR. HANDZO: If Mr. Larson does
3 want to ask the specific numbers, then based
4 on what the witness said, I would move that
5 that be restricted information. I think
6 certainly the amounts that get negotiated with
7 different artists certainly does seem like
8 confidential and sensitive business
9 information.

10 CHIEF JUDGE SLEDGE: Any objection
11 to the motion for the protective order to
12 apply to specific payments made by Alligator
13 Records to a specific artist? Without
14 objection, motion is granted.

15 (Whereupon, the proceedings went into
16 Closed Session.)
17
18
19
20
21
22

1 BY MR. LARSON:

2 Q When you talked about advances,
3 it's true, is it not, that the money that's
4 advanced is repaid out of that royalty, as
5 opposed to out of the initial gross or net
6 sales?

7 A Yes, exactly, as I think I
8 explained earlier.

9 Q Right. And it's the case that the
10 artist royalties that you talked about don't
11 actually get paid until after the advance has
12 been recouped. Is that correct?

13 A Right. That's correct.

14 Q Okay.

15 A I should say that's correct
16 throughout the record industry. I didn't make
17 that up.

18 Q Right. And so, in fact, in some
19 way, you actually want to pay artists
20 royalties because that would be a sign that
21 you've got a fairly successful record on your
22 hands. Is that right?

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1 A It's a funny way of putting it,
2 but if you're saying do I like making a
3 profit, yes, absolutely. Because I have
4 personal relationships with my artists, I am,
5 in fact, happy to pay them royalties.

6 MR. LARSON: A few more questions,
7 sir. I'm going to hand out now what's marked
8 as Exhibit 109.

9 (Whereupon, Service's
10 Exhibit 109 was marked
11 for identification.)

12 CHIEF JUDGE SLEDGE: Mr. Larson,
13 while you're doing that, I want to clarify
14 your last answer, Mr. Iglauer. When you
15 recoup your advances, is that a recoupment
16 that you don't pay any royalty until all of
17 your advance is recouped, or is that on a pro
18 rata basis?

19 THE WITNESS: I'm not sure I
20 understand the question.

21 CHIEF JUDGE SLEDGE: When you have
22 advances outstanding, and royalties are

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1 beginning to accrue, do you apply 100 percent
2 of those royalties to the outstanding
3 advances, or do you apply a pro rata part of
4 those royalties?

5 THE WITNESS: No, it's 100
6 percent, assuming I'm understanding the
7 question correctly. We have this pool of
8 money that we'll call the advance, the areas
9 that I already delineated, and then we'll have
10 a pool of money that we call royalties owed to
11 the artist. And I'd like to also make the
12 distinction that if the artist is also the
13 songwriter, or the publisher of the song,
14 that's a separate royalty pool, not commingled
15 with the recoupable advance, so in that case,
16 the artist is paid from record number one,
17 regardless of whether we've recouped. But in
18 terms of the artist royalty, as separate from
19 the writer royalty and the publisher royalty;
20 yes, any royalties earned by the sale are
21 applied against that advance.

22 CHIEF JUDGE SLEDGE: Not a

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1 percent.

2 THE WITNESS: Yes.

3 BY MR. LARSON:

4 Q Okay. Mr. Iglauer, do you
5 recognize what I've handed out as Exhibit 109?

6 A Yes.

7 Q Okay. And can you tell the Court
8 what it is?

9 A Sure. This is some sections of
10 the Alligator Records' website.

11 Q Okay. And up in the upper right-
12 hand corner, there's something called
13 "Streaming Radio"?

14 A Right.

15 Q And that Streaming Radio plays
16 automatically when a user navigates to this
17 page on the website. Is that --

18 A Actually, to a number of pages on
19 the website, yes. It sort of follows you
20 around in an annoying fashion.

21 Q That's my next question. And Eric
22 Lindell, as you've said earlier, is an

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1 Alligator artist. Correct?

2 A Right.

3 Q And I think as you can see here,
4 the song that's playing is the track *Give It*
5 *Time?*

6 A Right. The same track I was
7 talking about earlier.

8 Q All right. And if you look at the
9 second page, which I capture just a second or
10 two later, it shows that the album is *Change*
11 *In The Weather*. Is that right?

12 A Right.

13 Q Okay. And that's an album that
14 you've recently released.

15 A Correct.

16 Q Okay. And the streaming radio
17 channel actually plays the entire song. Is
18 that right?

19 A Yes, it does. It plays one song
20 each from the last, I believe, ten releases.

21 Q Right. And it loops those, it
22 plays the entire song, and then loops that

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1 around again.

2 A Yes.

3 Q If you could look at page 3 of the
4 printout. Now down to the left on page 3,
5 you'll see what I'll call an advertisement for
6 Mr. Lindell's album. Is that right?

7 A Right. Yes.

8 Q And that's the one that's playing
9 at the moment up in the streaming radio
10 station.

11 A Yes.

12 Q And there's a link there, a button
13 next to the picture of Mr. Lindell's record,
14 that says "Add To Cart".

15 A Yes.

16 Q Can you tell us what that is?

17 A Yes, we have a mail order business
18 which we operate primarily off the internet,
19 in which we make direct sales to consumers.

20 Q Okay. And the idea here, is it
21 not, is that by playing a song from Mr.
22 Lindell's album on the page that you're hoping

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1 that the visitor to the page will be enticed
2 to click that button and add the album to his
3 shopping cart.

4 A Yes. I'd like to point out again
5 that it's the song that we specifically are
6 working as the key song, one we want hooked
7 into people's brains, so that's the one we
8 want the repetition tactic for the public.

9 MR. LARSON: Okay. That's it for
10 that one. One more exhibit. Your Honor, I'd
11 like to move Exhibit 109 into evidence.

12 MR. HANDZO: No objection.

13 CHIEF JUDGE SLEDGE: Any
14 objections to Exhibit 109?

15 MR. HANDZO: No, Your Honor.

16 CHIEF JUDGE SLEDGE: Without
17 objection, Exhibit 109 is admitted.

18 (Whereupon, Service's
19 Exhibit 109 was
20 admitted.)

21 (Whereupon, Service's
22 Exhibit 110 was marked

for identification.)

BY MR. LARSON:

Q Mr. Iglauer, do you recognize this
handout?

A Yes.

Q Can you tell us what this is?

A This is another part of the
Alligator Records website. It's what we call
a jukebox, as you see.

Q And how this works, if I
understand it right, is that a user or a
visitor to the site can click on one of these
song names that are listed here and hear that
song at that moment. Is that correct?

A Yes.

Q Okay. And they can hear the whole
song?

A Yes.

Q And do you know off the top of
your head how many songs you have total in
this jukebox?

A I believe 220 songs. I don't want

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1 to swear to that.

2 Q Okay. So these songs are
3 available essentially on-demand, to use the
4 lingo we use here. Is that correct?

5 A Yes.

6 Q And that's different than the way
7 that the Streaming Radio function works that
8 we just looked at on the last exhibit.
9 Correct?

10 A Well, to the extent that these
11 don't play automatically. It is the same,
12 however, to the extent that we are choosing
13 which songs we wish to have provided as
14 samples to the public.

15 Q But from the user perspective, one
16 just plays automatically when they go to the
17 page, and here the user picks the song that he
18 or she wants to listen to.

19 A Yes, that's correct.

20 Q Okay. And with the webcasters
21 that we're talking about in this proceeding,
22 Yahoo and AOL.

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1 A Yes.

2 Q Is it your understanding that with
3 those webcasters, you tune into a particular
4 station and then you, essentially, get what
5 the station is playing at that moment?

6 A You mean as versus picking?

7 Q Yes.

8 A My understanding is yes, that
9 that's the case.

10 Q Okay.

11 A Essentially, it's like terrestrial
12 radio in that regard.

13 Q Okay. And then if you look to the
14 left here on this exhibit, there are buttons
15 next to the songs that are labeled as "Buy
16 Now"?

17 A Yes.

18 Q And what happens when you click on
19 the "Buy Now" button?

20 A It goes to another section of the
21 site where the consumer has the possibility of
22 making a purchase.

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1 Q Okay. So, again, by offering the
2 visitor to the site the opportunity to play
3 one of the songs, it's your hope, is it not,
4 that that visitor might be enticed to click
5 the "Buy Now" button, and actually purchase
6 the song?

7 A Yes.

8 MR. LARSON: Okay. Your Honor,
9 I'd like to move Exhibit 110 into evidence.

10 CHIEF JUDGE SLEDGE: Any objection
11 to Exhibit 110?

12 MR. HANDZO: No.

13 CHIEF JUDGE SLEDGE: Without
14 objection, Exhibit 110 is admitted.

15 (Whereupon, Service's
16 Exhibit 110 was
17 admitted.)

18 MR. LARSON: Now, Mr. Iglauer,
19 just a couple of more questions.

20 BY MR. LARSON:

21 Q You testified about the rise of
22 the big box retailers and the demise of some

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1 of the Indie record retailers.

2 A Many of the indie record
3 retailers, yes.

4 Q Let me just ask this; when you
5 sell songs online or albums online through
6 iTunes or through Amazon.com, you don't have
7 the same limitations on space that you run
8 into with a Wal-Mart or a brick and mortar
9 retailer, do you?

10 A If I understand the question
11 correctly, you're right.

12 Q Okay. I'm sorry, it wasn't formed
13 very well. And iTunes, for example, can list
14 millions of songs or records for sale if they
15 want.

16 A Yes, and they do.

17 Q Okay. And with iTunes or Amazon,
18 you don't pay those stocking fees that you
19 were talking about, end-cap fees. Correct?

20 A No. We do, in fact, have a
21 promotional relationship with Amazon which
22 involved our buying what's called an online

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1 store, which cost us, I wish I could remember
2 how much, a chunk of money when they put it
3 up, and which is a dedicated online Alligator
4 store within Amazon. But that's the only kind
5 of equivalent of a stocking or promotion fee
6 that I believe we do with Amazon, emphasis
7 believe because I don't want to tell you I'm
8 100 percent sure of that. I know that at this
9 point, iTunes does not offer any types of the
10 equivalents of retail promotions that we do
11 with physical retailers.

12 MR. LARSON: If I could have just
13 one moment, Your Honor.

14 CHIEF JUDGE SLEDGE: Yes.

15 MR. LARSON: Your Honor, I have no
16 further questions.

17 MR. JOSEPH: Your Honor, I'd like
18 to ask, if I might, Meg Ryan of our office to
19 begin examining this witness.

20 CHIEF JUDGE SLEDGE: Welcome back,
21 Ms. Ryan.

22 MS. RYAN: Thank you, sir.

1 MR. LARSON: Thank you, Mr.
2 Iglauer.

3 THE WITNESS: Thank you.

4 CHIEF JUDGE SLEDGE: Mr. Iglauer,
5 you just said something that confused me. The
6 last couple of questions you answered referred
7 to sales by Amazon and iTunes, and I inferred
8 from the question and answer that you are
9 making sales through iTunes and Amazon. Who
10 makes the sale? I thought you gave a license
11 to iTunes, and they made the sale.

12 THE WITNESS: Well, let me
13 separate the two. Amazon, at this point,
14 sells physical goods, regular CDs.

15 CHIEF JUDGE SLEDGE: Right.

16 THE WITNESS: They buy them from
17 our distributor just like a brick and mortar
18 store, and they resell them. Their site acts
19 in place of the brick and mortar store. They
20 represent about 5 to 6 percent of our national
21 sales at this point. iTunes sells digital
22 files. They are, in effect, a retailer of

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1 digital files, and I would prefer to use the
2 term, that they are a reseller. The word
3 "license" in my industry has a rather specific
4 meaning, which is much more like the word
5 "lease". We're not leasing the right to them,
6 we're allowing them to take digital files of
7 our music and sell them, and pay us a
8 percentage of the sales income that they
9 receive.

10 CHIEF JUDGE SLEDGE: So I was
11 correct that the sales are made by Amazon and
12 iTunes, not by you.

13 THE WITNESS: Right. You could
14 think in a sense that iTunes is a wholesale
15 customer of our's, if you like. Whereas,
16 Amazon is actually a customer of our
17 distributor.

18 CHIEF JUDGE SLEDGE: Thank you.
19 Amazon only sells physical --

20 THE WITNESS: At this time, yes.

21 CHIEF JUDGE SLEDGE: All right.
22 Thank you.

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1 THE WITNESS: They're going into
2 the downloads business in the fall.

3 CHIEF JUDGE SLEDGE: Thank you,
4 again.

5 MS. RYAN: Good afternoon, Mr.
6 Iglauer. My name is Meg Ryan. I represent
7 the Radio Broadcasters in this proceeding.

8 THE WITNESS: Yes. Good
9 afternoon.

10 (Whereupon, Service's
11 Exhibit 111 was marked
12 for identification.)

13 MS. RYAN: May I approach, sir?

14 CROSS EXAMINATION

15 BY MS. RYAN:

16 Q I'm handing you what's been marked
17 as Service's Exhibit 111 for identification.
18 Mr. Iglauer, what is Exhibit 111 for
19 identification?

20 A This is my testimony that's been
21 submitted to this Court.

22 Q If you would turn to page 10 of

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1 your testimony.

2 A I'm sorry, page 10?

3 Q Yes, please. Page 10, going on to
4 page 11, you're discussing the recording costs
5 that you also mentioned today.

6 A Yes.

7 Q And you end up by saying that, "In
8 sum, for each release it costs Alligator
9 between approximately \$12,000 and \$110,000 to
10 record an album. The typical cost is about
11 \$30,000", and that's the last sentence before
12 the next sub-section on page 11.

13 A Yes, I see that.

14 Q It's true that the 12-100,000
15 dollar per album figure that you cite is
16 attributable to the cost of scouting new
17 artists. Is that correct?

18 A No, that's not -- these are hard
19 costs. I would not put the cost of scouting
20 new artists in this category.

21 Q Well, what within the information
22 that is contained in pages 10 and 11, do you

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1 call "hard costs", as opposed to costs that
2 you do not attribute to the cost of the album?

3 A Looking at the second paragraph of
4 page 10, the cost that I'm talking about that
5 would be between 12,000 and 110,000 dollars
6 would be the second section, starting with
7 "renting a recording studio", and ending with
8 "renting instruments."

9 Now if this is not an all-in deal,
10 as I explained in that previous sentence, the
11 first sentence of paragraph 10, then the
12 additional amount of money would be the
13 advance paid to the artist. And those costs
14 would fall in that 30-110,000 dollars.

15 Q And those --

16 A I'm sorry, 12-110,000 dollars.

17 Q And is the difference in advances
18 that you pay to the artists part of the reason
19 for the variation in the costs that you have
20 here?

21 A One of the differences, yes.

22 Q And some of those advances are

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1 recoupable, you said.

2 A Those advances are recoupable,
3 yes.

4 Q Thank you for clarifying that
5 portion of your testimony. You didn't
6 describe today the hard work that you put in
7 to the start of Alligator Records. I'm
8 correct that part of what you did was
9 basically load up albums in your vehicle and
10 drive around the country to radio stations
11 promoting your record. Is that correct?

12 A First to radio stations, then to
13 distributors, yes.

14 Q And you would go to the radio
15 station first and ask them to play your music.

16 A Yes.

17 Q And then you would go to the
18 distributor and say hey, look, they're playing
19 my music. Would you like to sell it? Right?

20 A You've done your research very
21 well. That's correct.

22 Q Well, you've been interviewed by a

1 number of illustrious magazines, so I would
2 hope that I would do that much work. And it
3 was these efforts, kind of grass roots
4 efforts, to get radio stations to play your
5 music that encouraged people to then sell your
6 music in their stores.

7 A Yes. I should, along with other
8 things, but radio was part of that effort.

9 Q And in the early years, that was a
10 large part of your effort.

11 A We've always worked radio, and
12 press, and retail hand-in-hand, so yes, radio
13 was the first part of my effort, but we've
14 been extremely aggressive with print media, as
15 well.

16 Q And you attribute the success of
17 Alligator Records over the last 35 years to
18 the efforts that you've made to promote the
19 music, and the fact that you have good
20 artists.

21 A And also, the fact that those good
22 artists present exciting performances. I

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1 talked earlier about how I feel that artist
2 performance is the best sales tool we have,
3 and I'll stand by that. But if you're asking
4 me if radio has value, yes.

5 Q Okay. Well, I was asking you a
6 slightly different question; which is, the
7 things that you did at the beginning to
8 promote your music, going to radio stations,
9 going to stores, and seeking out other avenues
10 of promotion are the things that you do today.

11 A Yes, we do some more things, but
12 yes, we continue to do those, and they are an
13 important part of our job.

14 Q And it's those promotional efforts
15 that you discussed in the many times that you
16 were interviewed about the history of
17 Alligator Records.

18 A Yes.

19 Q And in most of those interviews,
20 you don't mention the promotional value of the
21 gigs that you described to the tribunal here
22 today.

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1 A I would hesitate to talk about
2 what I've said in most interviews. I'm
3 certain that in some interviews, I haven't
4 made a particular point of that.

5 Q What is *R&R Magazine*?

6 A Oh, R&R - Radio & Records.

7 Q What is it?

8 A It's what's called a trade
9 publication in the radio business. It is a
10 subscription publication, it's kind of in
11 tabloid format, kind of like a tabloid daily
12 newspaper, and it reports on primarily, I
13 should say, on what radio stations are
14 playing. It has a number of charts. We
15 talked earlier about the value of the charts.

16 To be honest with you, I very
17 rarely look at *R&R*, other people in my company
18 do, so I don't want to say something that
19 could be wrong.

20 Q What is the intended audience of
21 *R&R Magazine*?

22 A Programmers, people who make music

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1 decisions for what gets played on the radio.

2 Q What about *FMBQ*, are you familiar
3 with that publication or website?

4 A I'm somewhat familiar with *FMBQ*,
5 which is another format, a physical format but
6 it has rather a similar content. It's more
7 specifically aimed at certain formats of
8 radio; whereas, I believe that *R&R* is directed
9 at virtually every format of radio.

10 Q Is *FMBQ* similarly aimed at
11 programmers?

12 A Yes.

13 Q And am I correct in understanding
14 your testimony that *R&R Magazine* and *FMBQ* are
15 tracking radio air play, among other things?

16 A Yes. They're printing information
17 about radio air play. Tracking would
18 technically mean that they were going out and
19 doing the research. I believe that the
20 information they get, they're getting from the
21 stations, rather than actually listening to
22 the stations and writing down what they're

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1 playing. So to that extent I wouldn't use the
2 word "tracking", but otherwise, your general
3 concept is correct.

4 Q So basically, they're creating
5 lists that tell, I guess, independent labels
6 and other labels what music is being played.

7 A Well, and primarily, they're
8 telling programmers what other programmers are
9 playing. I talked about how much I perceive
10 programmers, especially commercial
11 programmers, as sheep, as followers, so
12 instead of using their own ears and saying
13 this would fit on our station, they tend to
14 look and say well, these other ten stations
15 are playing it, and, therefore, we should,
16 too. Again, that's one reason why we focus on
17 individual songs as much as possible.

18 Q So these charts have value to you
19 at Alligator Records in so far as if one of
20 your songs shows up on it, the expectation is
21 that that will encourage other radio stations
22 to also play the song.

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1 A Yes.

2 Q And your hope is that if they play
3 the song, if people like it, that they'll then
4 turn around and go and purchase the album?

5 A Right.

6 Q Do these charts tell you anything
7 about the success that the artist is having?

8 A I think I'm going to ask you to
9 rephrase the question, because "success" is
10 such a vague term.

11 Q Okay. I'm just trying to
12 understand in real terms what these charts
13 mean. I mean, I understand that they give you
14 information about what music is being played
15 by the radio stations, and that that will
16 encourage other radio stations, which in turn
17 will get the music to have more exposure. But
18 in terms of what that information conveys to
19 you, can you tell me what having one of your
20 songs on a chart conveys to you about the
21 success or the popularity of the song?

22 A Well, the hope is, of course, that

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1 because the radio station is repeatedly
2 playing that same song, that people will grow
3 to like it through exposure, that it will
4 result in a sale that will result in other
5 stations playing it, that may result in a
6 performance for the artist. These are the
7 spokes of the wheel, that the radio by itself
8 doesn't guarantee sales. Repeated radio play
9 certainly we hope makes sales more likely. We
10 have had records, and there are many famous
11 records, not particularly put out by my
12 company, which were radio hits but were not
13 sales hits.

14 Q And is part of the theory that
15 people are more likely to purchase music if
16 they've heard it?

17 A Yes.

18 (Whereupon, Service's
19 Exhibit 112 was marked
20 for identification.)

21 Q I'm going to hand you what's been
22 marked as -- may I approach, sir? I'm going

1 to hand you what's been marked as Exhibit 112.

2 Mr. Iglauer, what is Exhibit 112?

3 A This is another piece of our
4 website. I believe this came from our news
5 section.

6 Q Have you seen Exhibit 112 before,
7 or the information contained within it?

8 A I've seen the information. I
9 don't know if I've seen it in this form.

10 Q And this is information about Eric
11 Lindell, who we discussed before is one of
12 your new artists.

13 A Right. And, obviously, a priority
14 artist for us, as I think is probably clear to
15 everybody.

16 Q Right. When this news clip tells
17 us that "*Give It Time*, the first single from
18 Eric Lindell's Alligator debut, *Change In The*
19 *Weather* is the number one most added record on
20 the R&R AAA Indicator Chart", what does that
21 mean?

22 A Well, as I said, R&R, the

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1 publication, has a number of charts. I
2 believe that the indicator chart is, in a
3 sense, what we might call an up and coming
4 chart. It doesn't indicate that he's getting
5 the most amount of air play on the stations,
6 that it may indicate that he was the most --
7 this song was added to the most play lists in
8 the particular week that that chart was
9 printed in that magazine.

10 Q Okay. So according to Exhibit
11 112, Mr. Lindell's single was the most added
12 record on the R&R AAA Indicator Chart, on the
13 R&R Americana Chart, and the number two most
14 added record on the FMQB AAA Chart?

15 A Yes.

16 Q And R&R and FMQB are the trade
17 publications aimed at programmers that we
18 discussed earlier. Correct?

19 A Yes.

20 MS. RYAN: I ask that Exhibits 111
21 and 112 be moved into evidence, sir.

22 CHIEF JUDGE SLEDGE: What is the

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1 purpose of 111?

2 MS. RYAN: Exhibit 111 is his
3 direct testimony, sir.

4 CHIEF JUDGE SLEDGE: Why are you
5 offering that into evidence?

6 MS. RYAN: Oh, I'm sorry. I
7 wasn't certain if it was already in evidence.

8 CHIEF JUDGE SLEDGE: Any objection
9 to Exhibit 112?

10 MR. HANDZO: No, Your Honor.

11 CHIEF JUDGE SLEDGE: Without
12 objection, Exhibit 112 is admitted.

13 (Whereupon, Service's
14 Exhibit 112 was
15 admitted.)

16 BY MS. RYAN:

17 Q Mr. Iglauer, you're familiar with
18 the Alligator website?

19 A Yes.

20 Q What part in creating or
21 conceiving of its contents do you play?

22 A In terms of the overall structure

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1 of the website and the basic categories of
2 what's included, I was very involved. In terms
3 of things like what's posted in the news
4 section, for example, like this story, my head
5 of publicity actually does that. But I
6 certainly take responsibility for what's on my
7 website.

8 Q Your website contains links to
9 other blues-relates websites, doesn't it?

10 A Yes, come to think of it. Now I'm
11 hesitating. When I just said I took
12 responsibility, I don't want to go back on
13 that because it sounds pretty flaky to do so.
14 Actually --

15 MS. RYAN: I'm not trying to make
16 you flaky.

17 THE WITNESS: No, no, I can look
18 flaky all by myself. Some of those links have
19 been there a long time, some of them have been
20 added because somebody at a blues society says
21 would you mind adding this link. And my
22 assistant, the same one who listens to WWOZ,

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1 sometimes has just gone ahead and added those.
2 Sometimes she's asked me and I've said it
3 looks worthy, I guess we can add it. Frankly,
4 I simply haven't paid a lot of attention to
5 that part of the site, because it's not
6 selling anything.

7 CHIEF JUDGE SLEDGE: Do you put
8 that under the protective order?

9 THE WITNESS: The flaky part? I
10 really don't want that --

11 CHIEF JUDGE SLEDGE: Not paying
12 attention to your website.

13 THE WITNESS: Yes. The part about
14 being flaky, I'd rather not have in the public
15 record. Thank you.

16 BY MS. RYAN:

17 Q Are you familiar with a website
18 called "The Blues Highway"?

19 A I'm familiar with it to the extent
20 that I looked at it quite a few times when it
21 first came online, and it looked like it was
22 going to be a very helpful site for blues

1 fans. And then I noticed it wasn't getting
2 updated very regularly at all, and then I
3 stopped paying attention. I doubt I've been
4 to their site in the last year.

5 Q Okay. You've testified earlier
6 that Alligator Records today promotes radio
7 play of its songs on terrestrial radio.
8 Correct?

9 A Yes.

10 Q And am I correct that it promotes
11 that air play irrespective of whether the
12 terrestrial radio station happens to
13 simulcast?

14 A Yes.

15 Q In your written testimony you talk
16 about the fact that you sometimes hire
17 independent promoters. Do you recall that?

18 A Yes, independent promotion people.
19 Yes.

20 Q How is the -- on what basis is an
21 independent promoter paid?

22 A Generally, I can only speak about

1 my company. Generally, they charge us by the
2 week for their services whether they actually
3 convince any radio stations to play the
4 records or not. One of the independent
5 promotion people that we work with, in
6 addition will add on a fee if she actually is
7 able to score a station, so there'll be a
8 basic weekly charge, and an additional bonus
9 if she is scoring the station, if she gets the
10 station to add the record.

11 Q So when you say "scoring a
12 station", you're talking about the adds that
13 are tracked by *R&R* and *FMBQ*?

14 A Well, whether or not they're
15 tracked by *R&R* and *FMBQ*, the stations publish
16 play lists. The play lists are available to
17 us to see, and they tell us whether they're
18 playing something.

19 Q If you would go back and look at
20 Exhibit 111 and 110.

21 A The testimony?

22 Q I'm sorry, Exhibit 109 and 110.

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1 A One minute, please.

2 Q It's the Streaming Radio and the
3 jukebox.

4 A Right.

5 Q It's actually Exhibit 109 that I
6 really want to focus your attention on. The
7 Streaming Radio that's shown up at the top
8 right-hand corner of Exhibit 109 right now is
9 showing the artist, Eric Lindell, and the
10 song. Correct?

11 A Right.

12 Q And you've gone to the website.
13 You know how this feature works.

14 A Oh, yes. It plays automatically.

15 Q Well, it doesn't just play
16 automatically. I'm correct that if a listener
17 wants to, they can pause the song. Right?

18 A Oh, yes. I'm sorry, I should have
19 made that clear.

20 Q And if they want to, they can
21 rewind back to the previous song?

22 A Yes, they can flip to -- I

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1 believe, as I said, there are ten songs on
2 this jukebox, one each from our ten most
3 recent releases. I'm not positive about the
4 number ten, and the little arrows here allow
5 people to move between those songs.

6 Q And, in fact, if someone wants to,
7 they could go and listen to the song, *Give It*
8 *Time*, as many times as they wanted to without
9 paying for it.

10 A Yes, that's possible. It's a
11 chore, but they could do it.

12 Q I mean, in essence, both the
13 jukebox and the Streaming Video are, to some
14 sense, interactive.

15 A To the extent that you can control
16 what's played, if that's your definition of
17 interactive, yes.

18 Q You talked about the income that
19 you receive from Sound Exchange as manna from
20 heaven. Do you remember that testimony?

21 A Yes.

22 Q I'm correct that the statutory

1 royalties are a fairly new feature of revenue,
2 of income that you include in your revenue.

3 A Yes.

4 Q And if you would look at Exhibits
5 105 and 106, which are the 2004 and 2005
6 income P&Ls.

7 A Yes.

8 Q You would agree with me, sir,
9 wouldn't you, that the statutory royalties
10 that you receive from Sound Exchange are less
11 than 2 percent of your income?

12 A As a percent, yes. The thing that
13 I'd like to add to that is, unlike virtually
14 every other type of income that we receive,
15 there's not a commensurate expenditure
16 involved in receiving this income. I don't
17 have to spend time, spend money, hire people,
18 ship our promo copies, buy advertising to get
19 money from Sound Exchange.

20 It's very frustrating -- in every
21 other country in the civilized world,
22 terrestrial radio pays for its content, just

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1 like when you watch television and you see
2 *Lost* on whatever network it's on, the people
3 who make *Lost* aren't giving it free. The
4 network is paying for it. Only in the United
5 States does terrestrial radio not pay for
6 content.

7 MS. RYAN: I'm going to move to
8 strike all the testimony that Mr. Iglauer just
9 gave about terrestrial in other countries as
10 completely non-responsive to my question,
11 which was concerning a specific point on his
12 P&L with respect to the Sound Exchange income
13 as a part of overall income.

14 CHIEF JUDGE SLEDGE: Mr. Handzo.

15 MR. HANDZO: Your Honor, I think
16 he's entitled to explain his answers, and I
17 think it was fairly responsive to the subject
18 matter that she was taking him into.

19 CHIEF JUDGE SLEDGE: Objection
20 overruled.

21 BY MS. RYAN:

22 Q Leaving aside your commentary

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1 about what happens in other countries, I'm
2 correct that your Sound Exchange income is
3 less than 2 percent of your overall income?

4 A Well, I haven't done the math, but
5 I trust you, so I'll say yes.

6 Q Okay. And, basically, that's
7 money that's value-added, you don't have to
8 expend any additional fees to get that money
9 from Sound Exchange.

10 A Correct.

11 Q It's true that you've made great
12 efforts to inform your artists about the
13 statutory royalties. Right?

14 A About the Sound Exchange income?
15 Yes.

16 Q You've sent them letters?

17 A Yes.

18 Q And you've tried to communicate
19 with them by every means you know how.

20 A Right.

21 Q And it's true that in order to get
22 the statutory royalties, they need to sign

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1 some sort of paper which you then return to
2 Sound Exchange, after which they can get the
3 royalties.

4 A Yes.

5 Q And am I correct, sir, that at
6 least by 2005, less than half of your artists
7 had filled out the paperwork necessary to
8 receive the statutory royalties from Sound
9 Exchange?

10 A I don't know the answer to that.
11 I know that there are some artists I've
12 continue to badger, and some artists have done
13 it. The issue is the question of less than
14 half. Are you talking about my current
15 roster, are you talking about every artist who
16 ever recorded for me? I'll be glad to
17 acknowledge that a reasonable number of
18 artists have not done this, but I can't tell
19 you more or less than half.

20 Q Do you recall being interviewed by
21 the *Chicago Sun Times* in January of 2005 by a
22 Dave Hokstra.

1 A Hokstra, yes.

2 Q Do you remember telling Mr.
3 Hokstra, among other things, that you've "one
4 out and explained to people what the money was
5 for, way less than half of our artists signed
6 up, maybe 20"?

7 A I trust that Dave quoted me
8 correctly. I have made additional efforts
9 between January and now, and I've literally
10 badgered artists, and I have gotten artists to
11 sign up. I'm not denying that are there
12 artists who haven't signed up. I'm just not
13 confident of giving you a percentage at this
14 time.

15 Q You would agree that the success
16 of any given album depends on many factors?

17 A Yes.

18 Q And one of the factors is how good
19 the musical material is.

20 A Yes.

21 Q And one of the factors is how good
22 is the artist that's playing the musical

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1 material.

2 A Those are sort of tied together,
3 but yes.

4 Q Well, you would agree that a good
5 artist that has bad material isn't going to do
6 well.

7 A Yes.

8 Q And --

9 A Now that I understand your
10 question a little more clearly.

11 Q Or a bad artist that has really
12 good material probably isn't going to be --

13 A Right. It's a package, it's the
14 song and the delivery of the song, the
15 production of the song, the marketing of the
16 song. And sometimes it's just things out of
17 your control.

18 MS. RYAN: I have just a couple of
19 more questions, sir. If you can give me just
20 one minute, I think we'll save us time.

21 BY MS. RYAN:

22 Q You talked on direct about the

1 fact that your revenue has decreased
2 approximately 33 percent over the last five to
3 six years.

4 A The figures I was giving related
5 specifically to physical CD sales, but I can
6 tell you, I'm confident with, when I mentioned
7 the going from a gross of around \$4 million to
8 less than two and a half million dollars, I'm
9 comfortable with giving you that figure as an
10 overall gross figure.

11 Q Okay. So just turning
12 specifically to the revenue that you derive
13 from physical CD sales, if you look at Exhibit
14 105 and 106, there is a revenue line for
15 physical CD sales. Correct?

16 A Yes.

17 Q And that's a gross revenue number.
18 Right?

19 A Yes.

20 Q And it doesn't tell us how many
21 units of CDs you sold, does it?

22 A No, it's a dollar figure.

1 Q And am I correct that in 2003, the
2 entire industry decreased the cost of CDs from
3 approximately \$19 to approximately \$13. Do
4 you remember that?

5 A No, you're not correct.

6 Q What is the cost of a CD from
7 Alligator Records today?

8 A The retail price?

9 Q Yes.

10 A As I said before, full line
11 products are \$16.98. I did mention we do have
12 some midline titles which are \$11.98 price,
13 and some budget titles which are \$9.98.

14 Q So your testimony today is that
15 Alligator Records, at least, has not decreased
16 the cost of its physical product since 2003.

17 A That's right. Let me add to that,
18 there are a few full line titles which became
19 older, and which we decided to make midline
20 titles in hopes of increasing more sales, so
21 we may have dropped the price of ten or twenty
22 old titles. Our front line price has not

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1 changed, our new release price, the price of
2 an Eric Lindell record, if you'd like.

3 Q Do you remember talking in your
4 direct written testimony about your concern
5 about something called iFill made by Griffin
6 Technology?

7 A Yes.

8 Q This is on page 16 of his written
9 direct testimony.

10 A Yes.

11 Q It's true, isn't it, Mr. Iglauer,
12 that you can't specifically identify losses of
13 CDs or download sales that Alligator has
14 suffered specifically attributed to iFill?

15 A That's correct.

16 Q You've not done any studies?

17 A I don't know how I would.

18 Q Do you happen to know whether such
19 software is usable on the streaming and
20 jukebox features of your website?

21 A I've extremely recently been told
22 that, in fact, it should be usable on my

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1 website. And, frankly, I'm a little horrified
2 to find out. I never put that together in my
3 mind.

4 MS. RYAN: Thank you very much,
5 sir. I have no further questions.

6 THE WITNESS: Thank you.

7 CHIEF JUDGE SLEDGE: Ms. Brown,
8 any questions?

9 MS. BROWN: Yes.

10 CHIEF JUDGE SLEDGE: Ms. Brown,
11 what is your judgment at this time that you'll
12 be questioning?

13 MS. BROWN: No more than 10
14 minutes, Your Honor, probably less than that.
15 Would you prefer to take a break?

16 CHIEF JUDGE SLEDGE: I guess we
17 ought to go ahead and recess then. We'll
18 recess for 10 minutes.

19 (Whereupon, the proceedings went
20 off the record at 3:40:22 p.m. and went back
21 on the record at 3:53:03 p.m.)

22 CHIEF JUDGE SLEDGE: Thank you.

1 MS. BROWN: Good afternoon, Mr.
2 Iglauer.

3 THE WITNESS: Good afternoon.

4 MS. BROWN: Kris Brown on behalf
5 of National Public Radio.

6 CROSS EXAMINATION

7 BY MS. BROWN:

8 Q You're familiar with National
9 Public Radio and National Public Radio
10 programming, aren't you?

11 A Yes, I am.

12 Q Okay. In fact, you've been
13 interviewed by NPR, isn't that correct?

14 A Nationally at least once.

15 Q Okay. And that was in conjunction
16 with the 25th anniversary of Alligator
17 Records?

18 A I believe that's right.

19 Q And at that time, you were
20 interviewed about a CD that you had prepared
21 in relationship to the 25th anniversary?

22 A Right.

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1 Q Okay. I believe that you have
2 testified that blues is a niche market. Isn't
3 that right?

4 A Correct.

5 Q And by that you mean that blues
6 music is smaller ultimate market than pop
7 music, for example?

8 A The general understanding based on
9 figures I've seen is that blues music in its
10 widest definition occupies about 1 percent of
11 the music sold in the United States.

12 Q And so, it helps your business,
13 does it not, if the size of this niche market
14 increases through exposure of songs to new
15 listeners, and exposure of new blues artists
16 to old and new blues enthusiasts. Isn't that
17 right?

18 A Well, you're asking a broad
19 question. In general, exposure helps.

20 Q Okay. And you work to increase
21 the audience for your record sales through
22 various promotional activities, including

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1 radio air play. Is that right?

2 A Yes.

3 Q Okay. And in particular, you have
4 worked to increase air play on NPR. Isn't
5 that correct?

6 A We've worked - "in particular" is
7 a strong phrase. Because a number of public
8 radio stations, some of which are NPR
9 affiliates, and some of which aren't, are more
10 likely to play outside of the mainstream
11 music, we've had some success in getting our
12 music played on those stations.

13 MS. BROWN: I'd like to mark
14 Services Exhibit 113, please.

15 CHIEF JUDGE SLEDGE: Let me
16 clarify that last answer. The question was,
17 as I understood it, do you with NPR, and I
18 believe you responded you work with specific
19 stations. Does that answer your question?

20 THE WITNESS: I could be more
21 specific, if you --

22 BY MS. BROWN:

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1 Q Are there particular member
2 stations that you've worked with, Mr. Iglauer?

3 A A number of them, yes.

4 Q Okay.

5 A I was trying to make the
6 distinction between NPR affiliated stations
7 and public radio, in general, because public
8 radio, in general, is more supportive of niche
9 music, to use the term you introduced.

10 Q But you have specifically worked
11 with National Public Radio member stations to
12 promote your artists. Isn't that correct?

13 A Yes.

14 MS. BROWN: I'd like to mark
15 Services Exhibit 13.

16 CHIEF JUDGE SLEDGE: I think it's
17 113.

18 MS. BROWN: I'm sorry, 113. A
19 hundred too low.

20 (Whereupon, Service's
21 Exhibit 113 was marked
22 for identification.)

1 BY MS. BROWN:

2 Q Mr. Iglauer, do you recognize this
3 as an article dated January 12th, 2002 from
4 *Billboard Magazine*?

5 A I don't recall this particular
6 article, but it seems to be correct. I know
7 the writer personally.

8 Q And the writer is Chris Morris?

9 A Yes.

10 Q Okay. And if you turn to page 2
11 of this article, I know it's not marked, but
12 it's the second page, and go about seven or
13 eight paragraphs down, beginning with the
14 paragraph, "Labels selling niche product with
15 upper demo appeal face a particularly steep
16 climb at commercial radio, even at its few
17 liberal outlets."

18 A Yes, I see that.

19 Q Okay. And then it says,
20 "Alligator Records President, Bruce Iglauer,
21 whose 30-year old blues label caters mainly to
22 35-55 year old males says our commercial

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1 format, of course, is AAA", and reading on
2 from there. Does that refresh your
3 recollection of having given this interview to
4 Mr. Morris?

5 A I believe so, yes.

6 Q Okay. And if we go down a little
7 bit further, the next paragraph says, "Like
8 most of those interviewed by *Billboard*,
9 Iglauer sees NPR as the crucial destination
10 for reaching older consumers." And the next
11 paragraph says, "I would bet that there's a
12 growing marketplace for National Public Radio
13 and for NPR music shows, Iglauer says. We
14 know, for example, that NPR's Morning Edition
15 and All Things Considered, and Weekend Edition
16 and Fresh Air all sell records, and a lot of
17 records." Do you recall making that
18 statement?

19 A I don't recall the specific
20 interview, but I would stand behind the
21 statement.

22 Q And why do you make that

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1 statement?

2 A Unlike some other radio play, we
3 can see causal relationships. Let me back up
4 slightly. When we're covered on shows like
5 this, it's not like a normal radio show that
6 plays a lot of different mixtures of music.
7 It will generally be a feature, one of our
8 artists will be on the show, in one case I was
9 on the show, often performing; and, therefore,
10 it happens one time, maybe twice in a day, but
11 NPR doesn't repeat features again and again
12 like repeating songs again and again over a
13 period of weeks.

14 One place that we can see and
15 track sales easily is Amazon, because on the
16 Amazon website, they actually rank the sales
17 of every record, I believe every record that
18 Amazon sells. So you could see records that
19 are ranked at 150,000, as well as number one.
20 And they update these rankings quite
21 regularly, I believe every few hours, so we
22 can look there and see that Amazon, when we

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1 had Shamique Copeland on Weekend Morning
2 Edition, we saw Amazon sales that weekend that
3 we could track. We saw a bump, a big increase
4 in her ranking, so I do believe in the sales
5 power. I should say I don't believe in the
6 sales power of every NPR show, but the ones I
7 named I do believe in.

8 Q And so with respect to those shows
9 that are mentioned in this article, *Morning*
10 *Edition*, *All Things Considered*, *Weekend*
11 *Edition*, and *Fresh Air*, you would certainly
12 encourage the artists that are associated with
13 Alligator Records to appear on those programs,
14 wouldn't you?

15 A Yes.

16 Q Okay. You mentioned Shamique
17 Copeland. Is she still signed with Alligator
18 Records?

19 A Technically, she's between
20 contracts, but we're negotiating a new
21 contract with her now.

22 Q And you're interested in

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1 maintaining her as an artist?

2 A Yes.

3 MS. BROWN: Okay. Your Honor, I'd
4 like to mark Service's Exhibit 114.

5 (Whereupon, Service's
6 Exhibit 114 was marked
7 for identification.)

8 BY MS. BROWN:

9 Q Mr. Iglauer, you'll see that this
10 is a transcript of an interview with Scott
11 Simon and Shamique Copeland in October of
12 2000.

13 A Yes.

14 Q Was this the interview that you
15 were referring to when you said that there was
16 an increase in CD sales associated with this
17 interview?

18 A Yes.

19 Q Okay. And you'll see that at the
20 beginning of the interview, Scott Simon, as
21 the host, says, "Shamique Copeland sure can
22 sing." And then Ms. Copeland, in fact, sings

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1 one of the songs from her upcoming CD. Isn't
2 that correct?

3 A Yes.

4 Q Okay. And if we move on, Mr.
5 Simon actually asks her several questions
6 during the interview. You're welcome to read
7 through it, about her influences, her interest
8 in blues, and how she became a blues musician.
9 And if you move to page 3 of the interview,
10 just a few lines up from the bottom, beginning
11 with Mr. Simon, it says, "Scott Simon". It
12 says, "You've got, particularly with this CD,
13 you've got an extraordinary pedigree. I mean,
14 for example, B.B. King has your CD release
15 party." Ms. Copeland says, "Uh-hmm, yes. It
16 was at B.B. King's New York Times Square. Uh-
17 hmm, it was a great night." And then Mr.
18 Simon says, "And the great Ruth Brown performs
19 on this CD." And Ms. Copeland goes on to say,
20 "Yes." Do you think that Mr. Simon did some
21 research and some investigation before
22 conducting this interview with Ms. Copeland?

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1 MR. HANDZO: I would object to
2 asking him what he thinks the interviewer did
3 to prepare; lack of foundation, if nothing
4 else.

5 CHIEF JUDGE SLEDGE: Ms. Brown.

6 MS. BROWN: Well, he's testified
7 that the type of programming that's offered on
8 programs like *Weekend Edition*, is different in
9 kind than the programming on other types of
10 webcasting, and I'm trying to get his
11 impression about why that is. And I think
12 that it might go to the amount of background
13 investigation that the interviewer is doing to
14 elicit information from the artist being
15 interviewed.

16 CHIEF JUDGE SLEDGE: Objection
17 sustained.

18 BY MS. BROWN:

19 Q Moving on to the last page, just
20 below the end, again in reference to Simon -
21 I'm sorry, Simon is quoted as saying,
22 "Shamique Copeland's new CD is called *Wicked*.

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1 It's on the Alligator Records label. She
2 joined us here at National Public Radio with
3 her band members", and then the band members
4 are named. Do you think that the
5 specification of the name of the CD in the
6 interview would potentially encourage
7 listeners who were listening to that
8 broadcast, if they liked the music that was
9 being heard, to buy the CD?

10 A I would hope so.

11 MS. BROWN: No further questions,
12 Your Honor.

13 CHIEF JUDGE SLEDGE: That
14 completes the cross examination. Any redirect
15 by Sound Exchange?

16 MR. HANDZO: Yes, briefly, Your
17 Honor.

18 REDIRECT EXAMINATION

19 BY MR. HANDZO:

20 Q Mr. Iglauer, you were asked about
21 some of your artists who haven't signed up for
22 Sound Exchange royalties. Could you tell us

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1 why, if you know, that they haven't signed up?

2 A As I think I explained earlier, a
3 number of my artists are not very comfortable
4 with things that involve a lot of literacy
5 skills. In addition, a number of my artists
6 are not online. Getting somebody who doesn't
7 know how to negotiate the internet to go
8 online and find forms, print them out, fill
9 them out, mail them in can be very tough.
10 People are intimidated. Some of my artists
11 may not realize the benefit, though I've tried
12 to explain it to them. I'm a firm believer
13 that those who -- in fact, I know, I have been
14 told, that those who have signed up are happy
15 they did so, and are grateful for the money.
16 I wish I could tell you other motivation. I
17 don't know that I can.

18 Q Now let me ask you to take a look
19 at Service's Exhibit 108 that Mr. Larson
20 showed you.

21 A Oh, 108. Okay, the *Mix Magazine*
22 interview.

1 Q Yes.

2 A Okay.

3 Q Got it?

4 A Yes.

5 Q And if you look at what you
6 apparently wrote there about one, two, three,
7 four, five paragraphs down, you see a line
8 where you said, "We will cautiously experiment
9 with new technologies, especially if they
10 involve copy protection." Do you see that?

11 A Yes.

12 Q Do you know what you had in mind
13 there?

14 A When I was writing this, I believe
15 what I had in mind was being extremely
16 reluctant to deal with a situation where
17 copyable files, for example Mp3 files,
18 probably for specific example Mp3 files, were
19 being made available, because those are the
20 files which notoriously can either be played
21 on any type of player, can be sent easily
22 through the internet, can be offered through

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1 the so-called P2P sharing services, and the
2 expression has been used about theft on the
3 internet, that once the genie is out of the
4 bottle, it can't be put back in. Well, the
5 ultimate genie is the Mp3 file, because once
6 it's there, anybody can do anything with it.

7 Q Now you were just asked a few
8 questions about NPR, and let me ask you to
9 look first at Exhibit 113.

10 A Okay. Which one is that one? I'm
11 sorry.

12 Q It looks like that.

13 A Is it the one that isn't number?

14 Q No, it should be numbered at the
15 bottom.

16 A Okay. I'm sorry. Just show -- is
17 it okay if he walks over here and shows it to
18 me? Okay. Mine isn't numbered. That's my
19 excuse. Okay.

20 Q Now on the second page where you
21 were quoted, you described a number of NPR
22 programs, *Morning Edition*, *All Things*

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1 *Considered, Weekend Edition, and so on.*

2 A Right.

3 Q Are those NPR shows where your
4 artist or you would get interviewed?

5 A Yes. Just let me look at the
6 list. Yes. I don't believe any of our
7 artists have ever been played on these shows
8 without getting interviewed. The exception
9 might be *Fresh Air*, which runs record reviews,
10 and sometimes they'll just play a snippet of
11 music, and their reviewer will talk about it.

12 Q Okay. But with these programs,
13 you're either getting interviewed or you're
14 getting a review.

15 A Yes.

16 Q Okay. And, in fact, I guess
17 Exhibit 114 is one example of such an
18 interview?

19 A Yes.

20 Q Now you've described that you
21 might get a bump in sales after such an
22 interview. Do you recall that?

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1 A Yes.

2 Q Have you ever seen that kind of
3 bump in sales if all that happened was just
4 the song got played with an interview, without
5 a review?

6 A I don't believe that there is
7 actually specifically an NPR show, a National
8 Public Radio show that plays music in that
9 context, essentially like terrestrial radio
10 where they'll just play a lot of songs one
11 after the other. Individual NPR stations
12 locally may have shows like that, but I don't
13 believe there's one on NPR. We have an NPR
14 expert we could always ask.

15 Q So where you're seeing that bump
16 in sales, it's always associated with an
17 interview or a review.

18 A Yes. What I would describe as a
19 feature.

20 Q Okay. By the way, do you
21 understand there to be any value to NPR from
22 having access to your artists or to you to be

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1 able to interview?

2 A I'm sorry, I don't understand.

3 MS. RYAN: Objection; foundation.

4 MR. HANDZO: I'll withdraw. If I
5 can just have a minute. That's all I have,
6 Your Honor. Thank you.

7 CHIEF JUDGE SLEDGE: Thank you,
8 sir. I don't believe there would be any
9 additional questions on redirect. Ms. Ryan,
10 you seem to be coming forward. Do you have --

11
12 MS. RYAN: I just have one
13 question. I'd like to mark this exhibit.

14 (Whereupon, Service's
15 Exhibit 115 was marked
16 for identification.)

17 RECROSS EXAMINATION

18 BY MS. RYAN:

19 Q Mr. Iglauer, I'm looking at
20 Service's Exhibit 115. Am I correct that free
21 Mp3 downloads of certain hit singles are
22 available from your website?

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1 A I don't know if I'd use the term
2 "hit", but yes, free downloads are available
3 in that file form.

4 MS. RYAN: No further questions.

5 CHIEF JUDGE SLEDGE: Thank you,
6 Mr. Iglauer. That completes your testimony.

7 THE WITNESS: Thank you.

8 CHIEF JUDGE SLEDGE: What is our
9 schedule for next day of hearing?

10 MR. HANDZO: Your Honor, at this
11 point, I'm not sure that we have yet figured
12 out who the first witness is going to be when
13 we reconvene. We will alert everyone as soon
14 as we know, which I hope will be early next
15 week.

16 CHIEF JUDGE SLEDGE: Who will be
17 the witnesses in the first couple of days?

18 MR. HANDZO: That's what I'm
19 trying to figure out, is who's going to go
20 first. I know who we've got left, I just
21 don't know the order yet.

22 CHIEF JUDGE SLEDGE: It would be

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1 very convenient for us to know today who our
2 next witnesses are to review for. And you
3 can't tell us that?

4 MR. HANDZO: I can call my office
5 and see if anybody has figured that out yet.
6 I don't know right now. I think the other
7 thing we can do is, as soon as we know, we can
8 fax a letter to the Board so that you know as
9 quickly as we have it figured it out.

10 CHIEF JUDGE SLEDGE: That won't be
11 near as helpful to us as knowing right now
12 would, because of lack of contact with members
13 of the Board.

14 JUDGE ROBERTS: Mr. Handzo, you
15 just don't have any idea completely, or it's
16 you don't have any idea amongst three that
17 under consideration?

18 MR. HANDZO: Well, part of the
19 problem is my scheduling guru is not here in
20 the courtroom. Actually, if we wanted to take
21 a break for just a minute, I'm happy to call
22 back to the office and see if there's more

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1 they can tell me.

2 CHIEF JUDGE SLEDGE: We'll go
3 ahead and recess, and then if at all possible,
4 if you could notify us in the next several
5 minutes before we actually leave here, that
6 would be very convenient.

7 MR. HANDZO: Yes, I will do that.

8 CHIEF JUDGE SLEDGE: Mr.
9 Steinthal.

10 MR. STEINTHAL: One other
11 housekeeping matter. At one of the breaks, we
12 had a discussion with Mr. Perrelli about
13 submissions with respect to the Motion to
14 Strike Dr. Brynjolsson's testimony. And we've
15 agreed that we will simultaneously file so
16 there's not different times people file.
17 We're both going to file at the end of the day
18 on Wednesday of next week the submissions in
19 connection with the Motion to Strike, if
20 that's okay with the Board.

21 CHIEF JUDGE SLEDGE: Well, you
22 have been given the leeway to file no later

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1 than a week from today.

2 MR. STEINTHAL: Understood, and
3 we're both --

4 CHIEF JUDGE SLEDGE: If you want
5 to file before that, that's fine.

6 MR. STEINTHAL: We want to make
7 sure that neither party was going to file,
8 then read the other's, and get into that kind
9 of thing.

10 CHIEF JUDGE SLEDGE: That was not
11 an alternative offered to you.

12 MR. STEINTHAL: Right. So we've
13 agreed, and close of business on Wednesday is
14 when we're going to file on that. I just
15 wanted to let the Board know.

16 CHIEF JUDGE SLEDGE: Thank you.
17 We'll be in recess until 9:30, June 5. Thank
18 you.

19 (Whereupon, the proceedings went
20 off the record at 4:14:10 p.m.)

21

22

CERTIFICATE

This is to certify that the foregoing
transcript in the matter of:

The Digital Performance Right in
Sound Recording and Ephemeral
Recordings (Webcasting Rate
Adjustment Proceeding)

Before: Copyright Royalty Board

Date: Thursday, May 18, 2006

Place: Washington, D.C.

represents the full and complete proceedings of
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